SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1106.

DICK E. ARROWSMITH, PLAINTIFF IN ERROR,

vs.

AMELIA HARMONING, AS ADMINISTRATRIX OF THE ESTATE OF JOHN FREDERICK HARMONING, DECEASED, AMELIA HARMONING, LYDIA M. HARMONING, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings and also in the rendition of a plea which is in the said supreme court of the State of Ohio before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between Dick E. Arrowsmith and Amelia Harmoning, as administratrix of the estate of John Frederick Harmoning, deceased; Amelia Harmoning, Lydia M. Harmoning, William F. Harmoning, Carl H. Harmoning, and Fritz H. Harmoning, wherein was drawn in question an authority exercised under the State of Ohio by the probate court of Defiance county, State of Ohio, on the ground of such authority being repugnant to the Constitution of the United States, and the decision of the said supreme court of the State of Ohio was in favor of the validity of such authority, and wherein was drawn in question the construction of the first section of the Fourteenth Amendment of the Constitution of the United States, and the decision of the said supreme court was against the title, right, and privilege of the said Dick E. Arrowsmith, claimed under such section of said amendment of the Constitution, a manifest error hath happened, to the great damage of the said Dick E. Arrowsmith, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things
2 concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the first day of the next term, in the said Supreme Court to be then and there held, that, the reord and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the third day of October, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk of the Circuit Court of the United States for the Southern District of Ohio.

Clerk's fee, $50, paid by pl'ff.

B. R. COWEN, *Clerk,*
By THOMAS CORWIN, *Dep.*

Allowed.
SELWYN N. OWEN,
Acting Chief Justice, Supreme Court of Ohio.

[Endorsed:] Filed Oct. 3, 1885. In supreme court of Ohio. J. W. Cruikshank, clerk.

3 (*Citation.*)

The United States of America to Amelia Harmoning, administratrix of the estate of John Frederick Harmoning, deceased; Amelia Harmoning, Lydia M. Harmoning, William F. Harmoning, Carl H. Harmoning, and Fritz H. Harmoning, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washigton on the first day of the next term thereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein Dick E. Arrowsmith is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Selwyn N. Owen, acting chief justice of the supreme court of the State of Ohio, this third day of October, in the year of our Lord one thousand eight hundred and eighty-five.

SELWYN N. OWEN,
Acting Chief Justice, Sup. Court of Ohio.

4 *Pro-ff of Service of Citation.*

Service of the within accepted this 5th day of October, A. D. 1885, at Defiance county, Ohio.

HENRY B. HARRIS,
One of the Att's for Defendant in Supreme Court of Ohio.

5 *Petition in Error to the District Court of Defiance County.*

In the Supreme Court of the State of Ohio.

DICK E. ARROWSMITH, Plaintiff in Error,

vs.

AMELIA HARMONING, as Administratrix of the Estate of JOHN FREDerick Harmoning, Deceased; Amelia Harmoning, Lydia M. Harmoning, William F. Harmoning, Carl H. Harmoning, and Fritz H. Harmoning, Defendants in Error.

Said plaintiff in error says that in the case of himself, by his next friend, Rinaldo Evans, plaintiff, against John Frederick Harmoning, defendant, in a suit therein pending at the May term, 1882, of the court of common pleas of said county, judgment was rendered against said plaintiff and in favor of said defendant; that on petition in error to the district court of said county, at its March term, A. D. 1883, the said district court affirmed said judgment and rendered judgment against the said plaintiff and for the said defendant.

This plaintiff in error further says that since the said judgment of the district court aforesaid was rendered he has become of full age, and now prosecutes this action in his own right; also

That since the said judgment of the said district court the said John Frederick Harmoning has departed this life intestate, leaving surviving him the said defendants in error, Amelia Harmoning, his widow, and who, if this court shall affirm the judgment of the said district court, is entitled to dower estate in the lands and real estate in the petition described, and Lydia M. Harmoning, William F. Harmoning, Carl H. Harmoning, and Fritz H. Harmoning, his sole heirs at law and entitled to the next estate of inheritance in said lands and real estate if said judgment be affirmed; that all of said defendants, said heirs at law, are minors, said Lydia M. and William F. over the age of fourteen years, and said Carl H. and Fritz H. under the age of fourteen years.

That said defendant in error, Amelia Harmoning, has been duly appointed and qualified as administratrix of the estate of said
6 John Frederick Harmoning, deceased, under and by virtue of the order of the probate court of said Defiance county.

This plaintiff in error files herewith a transcript of the journal entries of the judgment and order of the said district court made and rendered in said case and the original papers therein, and he says there is error in the judgment record and proceedings of said district court in this, to wit:

1st. That the said district court should have reversed the judgment of the court of common pleas in said case instead of affirming it.

2d. That said district court should have rendered judgment for the plaintiff therein instead of for the defendant.

3d. That by affirming the judgment of the court of common pleas therein by said district court this plaintiff in error was deprived of his right of trial by jury, contrary to the provisions of the constitution of this State, and deprived of his property without due process of law, contrary to the provisions of [the] Constitution of the United States of America.

Wherefore this plaintiff in error prays the court that summons may be duly served on the said defendants in error to appear and answer this his petition in error; that if this court shall be of the opinion the interests of said minor defendants require it, a guardian *ad litem* may be appointed for said minor defendants, and that the said judgment of the district court and of the court of common pleas may be reversed and this plaintiff in error restored to all that he has lost thereby.

NEWBEGIN & KINGSBURY,
ALEX. S. LATTY,
Att'ys for Plaintiff in Error.

THE STATE OF OHIO, } *ss:*
Defiance County, }

Henry Newbegin, one of the attorneys in the above-entitled petition in error, being sworn, says that the said plaintiff in error is a non-resident of the State of Ohio and not now here present, and affiant says that the matters of fact set forth in said petition are, as he verily believes, true.

HENRY NEWBEGIN.

Sworn to before me and in my presence subscribed this 15th day of December, 1883.

RALPH L. RAINBOW,
Notary Public.

7 *Judgment of District Court.*

And thereupon said cause was submitted to the court upon the pleadings therein, the judgments, orders, and findings of the court below, and the bill of exceptions; and the court, being fully advised in the premises, do find there is no error in the proceedings, findings, rulings, or judgments of the court of common pleas therein.

Wherefore it is ordered and adjudged by the court herein that said judgment of the court of common pleas be, and the same is hereby, affirmed, and that said defendant recover of said plaintiff his costs herein expended, taxed to $——.

And it is further ordered that a special mandate be sent to the said court of common pleas to carry this judgment into execution.

To all of which findings, orders, and juudgments of said court said plaintiff, by his counsel, did then and there and does now except.

THE STATE OF OHIO, } *ss:*
Defiance County. }

I, Jno. P. Cameron, clerk of the common pleas and district courts within and for said county, and in whose custody the files, journals, and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing is taken and copied from the journal of the proceedings of the district court within and for said county, and that said foregoing copy has been compared by me with the original entry on said journal of said court and that the same is a correct transcript thereof.

In testimony whereof I do hereto subscribe my name officially and affix the seal of said court, at the court-house in Defiance, in said county, this 17th day of April, A. D. 1883.

[SEAL.] JNO. P. CAMERON, *Clerk.*

8 *Petition in Common Pleas.*

The said Dick Evans Arrowsmith, by Rinaldo Evans, who is admitted by the court here to prosecute for and on the behalf of the aforesaid Dick Evans Arrowsmith, who is an infant under the age of twenty-one years, as the next friend of the said Dick Evans Arrowsmith, plaintiff, hereby complains of the said John Frederick Harmoning, defendant, for that the said Dick Evans Arrowsmith is seized in fee-simple of the following-described lands and tenements—that is to say, the whole of section number thirty-six, in township number four north, of range number three east, containing six hundred and forty acres of land, more or less, in said county, save and except therefrom a strip or tract of land of one hundred feet in width, in the southeast quarter thereof, now used and occupied by the Wabash, St. Louis and Pacific Railway Company as and for the

right of way for its railroad in said southeast quarter, and which saidstrip or tract of land contains six and twenty-five one-hundredths acres of land. And said plaintiff, further as aforesaid complaining, says that the said Dick Evans Arrowsmith is entitled to the possession thereof, and that the said defendant unlawfully keeps the said plaintiff out of the possession thereof.

The said Dick Evans Arrowsmith, by his said next friend, Rinaldo Evans, therefore prays judgment against the said defendant for the recovery of the possession of the aforesaid premises, which he, the said defendant so as aforesaid, unjustly detains from the said Dick Evans Arrowsmith.

Second cause of action:

And the said infant, Dick Evans Arrowsmith, by the said Rinaldo Evans, as the next friend of the said Dick Evans Arrowsmith, plaintiff, for this his second cause of action against said defendant, hereby further as aforesaid complains of the said defendant and says that the aforesaid defendant has been in the possession of the
9 aforesaid premises of which he, the said defendant so as aforesaid, unlawfully keeps the aforesaid plaintiff out of the possession thereof, and that he, the said defendant, has received the rents, issues, and profits thereof from the 20th day of August, in the year 1877, up to the time of the commencement of this action, and said plaintiff hereby avers that he has sustained damages by the unlawful withholding of the possession of the said premises during all that time to the sum of $2,500.

The said plaintiff, therefore, by the said Rinaldo Evans, his next friend as aforesaid, hereby prays judgment against the said defendant for the recovery of the possession of the said premises, and also for the said sum of $2,500, his damages so as aforesaid sustained.

NEWBEGIN & KINGSBURY,
LATTY & PEASLEE,
His Attorneys.

Answer in Common Pleas.

Now comes the said defendant, John Frederick Harmoning, and, answering the petition of said plaintiff filed herein, admits that he is in possession of the said lands in said plaintiff's petition described, and he denies each and every, all and singular, the allegations in said petition not herein above admitted to be true.

HARRIS & CAMERON AND
COX & COCHRAN,
Att'ys for Defendant.

Trial. Finding of Facts and Judgment in Common Pleas.

This day came the said parties by their respective attorneys, and thereupon this cause came on for trial, and a jury being waived by both parties, and consent by them given to the hearing and determination thereof by the court, both parties requested that the
10 court do state the findings of facts and conclusions of law separately. Having heard the evidence and arguments, the court do find the *following to be the* facts of this case to be as follows:

Finding of Facts.

On the 22d day of July, A. D. 1869, Dick Evans Arrowsmith was a minor of the age of six years, and a resident of said Defiance county.

On the day last named and for a long time prior thereto the said Dick Evans Arrowsmith was the owner in fee-simple of the lands described in the petition in this case. On that day Edward H. Gleason was the duly appointed guardian of said minor, and as such filed in the probate court of said county a petition in due form, the object and prayer of which was the sale of said real estate, with all the other real estate of which said minor was then the owner in fee-simple, for the maintenance and education of said ward and the payment of certain indebtedness of said ward. Such proceedings were lawfully and duly had by and before said probate court as that thereafter the said court duly confirmed and approved an appraisement of said lands theretofore duly made in said proceedings by appraisers duly thereunto appointed. Thereupon the said probate court proceeded to and did find and order as follows, to wit: "Said Edward H. Gleason having, upon his appointment as such guardian, given bond with reference to the value and sale of the said real estate of his said ward, which bond is now adjudged to be sufficient for the purpose hereof, therefore the giving of additional bond is hereby dispensed with, and thereupon, without ordering or requiring said guardian to give any further or additional bond, and without any such additional bond having been given, the said probate court, on the 10th day of November, A. D. 1869, ordered said guardian to sell said lands or any parcel thereof at private sale, but at not less than the appraised value thereof, and upon the terms of one-
11 third cash in hand on the day of sale, one-third in one year, and one-third in two years, with interest payable annually, and the deferred payments to be secured by mortgage on the premises. Thereafter the said guardian, pursuant to said order of said probate court, sold the said lands described in petition herein to the said defendant at the dates, for the sums, and of the number of acres following, to wit: On 15th day of November, 1869, 153.25 acres, for $1,537.50; on the 3d day of May, 1873, 87 acres, for $812.10; on the 4th day of December, 1874, 400 acres, for $6,000. And upon such sales being reported to and approved and confirmed by said court and upon the order of said court in that behalf made — proceeded to and did execute in due form and deliver to said defendant his deed as such guardian, purporting by their terms and recitals to convey in fee-simple all the title and interest which the said ward theretofore as aforesaid had held and was seized of, in, and to said lands to the said defendant, who thereupon paid and secured to the said guardian the purchase price of said lands according to the terms of the order of said court. Thereupon the said defendant entered into the possession of said real estate and remained so in possession thereof up to and until the commencement of this action, having in no manner aliened or disposed of any interest therein.

As conclusions of law from the premises, the court finds that the

said plaintiff was not, but on the contrary the said defendant was, at the commencement of this action, seized in fee-simple of the lands described in the petition in this cause. As further conclusions of laws the court finds that the said plaintiff was not, but on the contrary the said defendant was, at the commencement of this action, entitled to the possession of said lands. It is therefore considered by the court here that the said defendant go hence without day and recover of the said plaintiff his costs herein taxed.

It is further ordered that the said plaintiff pay his own costs herein, or in default thereof that execution issue therefor.

12 To all the findings, conclusions, orders, and judgments above recited the said plaintiff, at the time, duly excepted and presented his bill of exceptions herein, which is allowed, signed, sealed, and ordered to be made part of the record herein. And thereupon the plaintiff moved for a new trial of this case for the reasons therein stated; which motion was overruled by the court, to which the plaintiff by his counsel excepted, and his bill of exceptions was signed and allowed, as hereinabove set forth.

Motion for New Trial.

Said plaintiff moves the court to set aside its findings, and for a new trial of this cause for the following reasons:

1. Error of law occurring during the trial, in refusing to admit testimony offered at the trial, to which the plaintiff at the time excepted.
2. That the conclusions of law as found by the court are contrary to the findings of fact, and not the law of the case.
3. The judgment of the court is contrary to the law of the land.
4. The judgment of the court should have been for the plaintiff instead of for the defendant, upon the facts as found by the court and the law of the land.

NEWBEGIN & KINGSBURY,
Att'ys for Pl'ff.

Bill of Exceptions.

Be it remembered that on the trial of this cause the said plaintiff, to maintain the issues on his part, offered in evidence the writing hereto attached marked "A" and made part thereof, which was received and considered by the court, except the following words of the certificate endorsed upon the said copy of bond, to wit: "And only one given by said guardian, as appears from my records,"

13 which were excluded from consideration by the court as incomplete, to which exclusion the said plaintiff at the time duly excepted.

The said Exhibit "A" was the only evidence offered upon the trial upon the subject of the guardian's bond, except the recital from the records of the said probate court, which is set forth in the finding of facts of record in this cause, to which reference is hereby had.

Upon request of said plaintiff this his bill of exceptions is allowed, signed, sealed, and ordered to be made part of the record herein.

Attest: SELWYN N. OWEN, [SEAL.]
Judge of said Court.

"A."

Know all men by these presents that we, Edward H. Gleason and Henry Hardy, are held and firmly bound unto the State of Ohio in the sum of five thousand dollars, for the payment of which we hereby jointly and severally bind ourselves. Sealed with our seals, and dated this 15th day of July, A. D. 1869.

The condition of the above obligation is such that whereas the above-bound Edward H. Gleason has this day been appointed by the probate court of Defiance county, Ohio, guardian of the person and estate of Dick Evans Arrowsmith, minor child of John C. Arrowsmith, deceased, late of Defiance county, Ohio, and which appointment the said Edward H. Gleason has accepted:

Now, if the said Edward H. Gleason shall faithfully discharge all his said duties as such guardian, then the above obligation to be void; otherwise to remain in full force.

EDWARD H. GLEASON.
HENRY HARDY.

This bond approved in open court this 15th day of July, A. D. 1869.

JACOB J. GREENE, [SEAL.]
Probate Judge.

14 THE STATE OF OHIO, }
Defiance County, } *ss:*

I, Jacob J. Greene, probate judge of said county, do hereby certify the within is a true copy of the original bond given at the time of the appointment of said Edward H. Gleason as guardian of Dick Evans Arrowsmith, minor, and only one given by said guardian, as appears from my record.

Witness my hand and official seal this 11th day of May, 1882.

JACOB J. GREENE, [SEAL.]
Probate Judge.

Petition in Error.

In the District Court of Defiance County.

DICK EVANS ARROWSMITH, by his next friend, RINALDO EVANS, Plaintiff in Error,
vs.
JOHN FREDERICK HARMONING, Defendant in Error.

Said plaintiff in error annexes hereunto a certified copy of the orders and judgment of the court of common pleas of said county made in this suit, and files herewith the original files in this case, and says there is error in the record and proceedings of the court of common pleas in this, to wit:

1st. That said court erred in its rulings and orders made during the trial of this suit and excepted to at the time by this plaintiff.

2d. That the said court of common pleas erred in its conclusions of law as set forth in its findings hereunto annexed.

3d. That the said court of common pleas erred in overruling and in not sustaining the plaintiff's motion for a new trial of this case.

4th. That the said court of common pleas erred in rendering judgment for the defendant in error and against this plaintiff in error, when, according to the law and the facts, judgment should have been rendered for this plaintiff and against the defendant.

Wherefore the plaintiff in error prays the court that the said judgment of the court of common pleas be reversed and this plaintiff restored to all that he has lost thereby.

NEWBEGIN & KINGSBURY AND
A. S. LATTY,
Att'ys for Plaintiff in Error.

Syllabus by the Court.

ARROWSMITH *v.* HARMONING.

1. Where there has been such acquiescence in the decision of a court that it has become a rule of property, such decision will not be overruled unless it violates fundamental principles, or is clearly wrong and mischievous in its consequences.

2. An order of the probate court for the sale by a guardian of the real estate of his ward, where the bond provided for in the statute (1 S. & C. 676, §§ 27, 28; Rev. [Stat.] §§ 6285, 6286) is not given, although it may be erroneous, is not void. Mauarr *v.* Parrish, 26 Ohio St. 636, followed and approved.

Error to the district court of Defiance county.

Opinion of the Court.

Okey, J.: In Mauarr *v.* Parrish, 26 Ohio St. 636, it appeared that the probate court of Lawrence county, in 1864, appointed a guardian for minors; that the guardian gave bonds at the time of his appointment, in usual form as prescribed by statute (1 S. & C. 671, § 6; Rev. Stat. § 6259); that in 1866, he filed a petition in that court, obtained an order of sale, and sold the real estate of his wards, without giving the additional bonds provided for by the statute, the probate court finding "the bonds already given by the guardian to be sufficient." And this court sustained the title of the purchaser.

That case is directly in point. The facts in the two cases were substantially the same, and the proceedings in both were under statutory provisions which are the same, except in a single particular not important to the case before us. 1 S. & C., 670, 681; Rev. Stats., §§ 6254–6301. The statute which governed the proceeding in Mauarr *v.* Parrish provided (1 S. & C., 671, § 6) that upon the appointment of a guardian of a minor's estate by the probate court such guardian "shall give bond, with freehold sureties, payable to the State of Ohio, in double the amount of the personal estate belonging to said minor, and also of the gross amount of rents that will be probably received by the guardian from the real estate of said minor during his or her minority, which bond shall be conditioned for the faithful discharge of the duties of said person as

such guardian." The probate court may require "such guardian to give additional bond whenever, in the opinion of said court, the interest of the ward of such guardian shall demand the same." The guardian may obtain authority to sell the real estate of his ward under certain circumstances. The application must be made by petition, which may be filed in the probate court. § 24. "Upon such petition being filed, verified by the oath of the guardian, the court shall order the petitioner to give notice to his ward, who shall be defendant to the petition, of the filing and demand thereof,
17 and the time when the same will be heard, in such manner as to the court shall seem reasonable and proper."

§ 25. "At the time appointed for the hearing of said petition, and being satisfied that the notice named in the last preceding section has been given, and that such real estate ought to be sold, the court shall appoint three freeholders of the county in which said real estate shall be situated, who are not of kin to the petitioner, to appraise said real estate, and the same shall not be sold for less than two-thirds of the appraised value thereof."

§ 26. "Said appraisers shall take an oath to truly and impartially appraise said real estate at the fair cash value, which oath shall be indorsed on the certificate of their appointment."

§ 27. "Upon the appraisement of said real estate being filed, signed by said appraisers, the court shall require such guardian to execute a bond, with sufficient freehold sureties, payable to the State of Ohio, in double the appraised value of such real estate, with condition for the faithful discharge of his duties, and the faithful payment and accounting for of all moneys arising from such sale according to law."

§ 28. "Upon such bond being filed and approved by the court, the court shall order the sale of such real estate, providing in the order for reasonable notice and the place of such sale in the county in which such real estate shall lie, and the credit to be given for the payment of the purchase-money, and the deferred payments of the purchase-money shall be secured by a mortgage, executed by the purchaser, upon the real estate sold, and they shall bear interest at the rate of six per centum per annum from the date of sale, payable annually."

§ 29. "Upon the return day of the order of sale issued by the court, such guardian shall make report of the sale by him made; whereupon the court, on being satisfied that such sale was fairly and legally made, shall confirm the same, and order the petitioner to execute a deed of conveyance for the real estate so sold, upon
18 the purchaser securing the deferred payments of the purchase-money, in the manner prescribed in the last preceding section."

At the time of the proceedings in the probate court, in the case now under consideration, the same statutory provisions which controlled Mauarr *v.* Parrish were still in force, except that the above section 28 had been repealed and re-enacted without other material change than to confer power on the court to authorize the guardian to sell at private sale, if the interest of the ward would be thereby

promoted. S. & S., 383; Rev. Stats., § 6286. This change, it will be seen, is wholly immaterial as respects the question before us.

We express no opinion upon the question whether the sureties in the bond given by the guardian, at the time of his appointment, are or are not liable for the proceeds of the sale of the real estate. Many cases support the view that they would be liable. Assuming, however, that they are not liable, and that before granting an order for the sale of the real estate the probate court should have required the guardian to give the bond specified in sections 27 and 28, still, we are fully justified in following Mauarr *v.* Parrish on two grounds:

1. Mauarr *v.* Parrish has become a rule of property. A decision having attained that importance should never be disturbed, unless it violates fundamental principles, or is not only plainly wrong, but mischievous in its consequences. Kearny *v.* Buttles, 1 Ohio St., 362; Gray *v.* Askew, 3 Ohio, 466, 478; Sellers *v.* Corwin, 5 Ohio, 398, 408; Kinsman *v.* Loomis, 11 Ohio, 475, 479; White *v* Denman, 1 Ohio St., 110, 115; Corwin *v.* Benham, 2 Ohio St., 36, 44; Crumbaugh *v.* Kugler, 2 Ohio St., 373, 380; Strong *v.* Beach, 11 Ohio St., 283, 288: Knox Co. *v.* Nichols, 14 Ohio St., 260, 269; Day *v.* Munson, 14 Ohio St., 488, 492. And Mauarr *v.* Parrish is not within any such exception to the rule.

2. The decision in Mauarr *v.* Parrish was right. The probate court had jurisdiction of the subject-matter,—*i. e.*, it was clothed with authority to order the sale of the lands of a minor on the petition of his guardian; and it is fair to say from the record
19 that notice of filing the petition, provided for by the statute, had been served on the minor before any order was made in the proceeding, in the manner in such statute provided; and hence when the order of sale was made, and also when the sale was confirmed, the probate court had not only jurisdiction of the subject-matter, but also the parties. This being true, the order of sale and the order of confirmation, although they may have been erroneous, were not void. "The judgment or final order of a court having jurisdiction of the subject-matter and parties, however erroneous, irregular, or informal such judgment or order may be, is valid until reversed or set aside, * * * within which rule the orders of probate courts are classed. Shroyer *v.* Richmond, 16 Ohio St., 455. If the judgment or order is erroneous, it may be reversed; if it is irregular or informal, it may be corrected on motion; in neither case, however, is it subject to collateral attack." Wehrle *v.* Wehrle, 39 Ohio St., 365.

True, Mauarr *v.* Parrish is very briefly reported on the question we are considering. But the strength of an opinion is not to be determined from its length. Frequently cases are disposed of by the application of principles so firmly settled that the citation of authorities in support of them would be a work of supererogation. The judge delivering the opinion in Mauarr *v.* Parrish probably thought the case belonged to that class, and hence the brevity of the report; but the ground of the decision is clearly indicated—that is, that the court having jurisdiction of the subject-matter and

parties, the order of the sale and the order of the confirmation, though they may have been erroneous, were not void—and that is sufficient. The record and a brief on each side of the case have remained on file in this court, and we have no doubt that the question received the careful consideration, as in its decision, in the way stated, it received the concurrence of every member of this court. And although cases in apparent opposition to Mauarr *v.* Parrish have been cited, yet nearly all of them are clearly distinguishable from it, when regard is had to the statutes on which they were based; and Mauarr *v.* Parrish is fully supported by Watts *v.* Cook, 24 Kansas, 278; Bunce *v.* Bunce, 59 Iowa, 533; Lockhart *v.* John, 7
20 Barr, 137; Merklein *v.* Trapnall, 10 Casey, 42; Thorn's Appeal, 35 Pa. St., 47; Dixey *v.* Laning, 13 Wright 143.

Diehl *v.* Friester, 37 Ohio St., 473, and Wehrle *v.* Wehrle, *supra*, have been cited as supporting the view that the sale was void. In Diehl *v.* Friester, it appears that the probate court allowed an injunction, on an *ex parte* application, in an action pending in the court of common pleas. The sole purpose for which the probate court was clothed with jurisdiction was with respect to the injunction, and by express terms of the statute the injunction could not operate until bond was given. As bond was not given, the injunction was wholly inoperative, and hence an order of the probate judge for the imprisonment of the defendant, in proceedings in that court, for contempt in refusing to obey such an injunction, was held to be void. In Wehrle *v.* Wehrle it appeared that under the statute relating to administrators' sales the probate court was denied jurisdiction to order the sale of a homestead upon any terms or under any circumstances, and hence the sale of the homestead, under the order of the probate court, in such case, was held to be void. We find nothing in these cases to support the claim of the plaintiff in error. The case before us has been ably argued, and we report it thus fully to show that it is clearly our duty to adhere to Mauarr *v.* Parrish.

Judgment affirmed.

21 *Error to the District Court of Defiance County.*

THE STATE OF OHIO, *City of Columbus:*

Supreme Court of the State of Ohio. January Term, A. D. 1885.

DICK E. ARROWSMITH

vs.

AMELIA HARMONING, Adm'r'x, &c., *et al.*

This cause came on to be heard upon the transcript of the record of the district court of Defiance county, and was argued by counsel. On consideration whereof it is ordered and adjudged by this court that the judgment of the said district court be, and the same is hereby, affirmed, and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendants in errror recover from the plaintiff in error their costs herein expended, taxed at $——.

Ordered, That a special mandate be sent to the court of common pleas of Defiance county to carry this judgment into execution.

Ordered, That a copy of this entry be certified to the clerk of the district court of Defiance county "for entry."

I, J. W. Cruikshank, clerk of the supreme court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

Witness my hand and the seal of said court this 3d day of October, A. D. 1885.

[Seal of the Supreme Court of the State of Ohio.]

J. W. CRUIKSHANK, *Clerk.*
By J. W. SLOCUM, *Deputy.*

22 (Copy.)

Supersedeas Bond.

In the Supreme Court of the United States.

DICK E. ARROWSMITH, Plaintiff in Error,
vs.
AMELIA HARMONING, AS ADMINISTRATRIX OF THE ESTATE OF JOHN Frederick Harmoning, Amelia Harmoning, Lydia M. Harmoning, William F. Harmoning, Carl H. Harmoning, and Fritz H. Harmoning, Defendants in Error.

In error to the supreme court of Ohio.

Know all men by these presents that we, Dick E. Arrowsmith Benjamin B. Kingsbury, and Henry Newbegin, are held and firmly bound unto the above-named Amelia Harmoning, as administratrix of the estate of John Frederick Harmoning, Amelia Harmoning, Lydia Harmoning, William F. Harmoning, Carl H. Harmoning, and Fritz H. Harmoning, defendants in error, in the sum of two hundred and fifty dollars ($250.00), to be paid to said defendants in error, to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, jointly by these presents.

Sealed with our seals, and dated this second day of October, A. D. 1885.

Whereas the above-named plaintiff in error has prosecuted his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of the State of Ohio:

Now, therefore, the condition of this obligation is that if the above-named plaintiff in error shall prosecute his said writ of error to effect and answer all costs that may be adjudged or awarded against him if he shall fail to make good his plea, then this obligation to be void; otherwise in full force.

(Signed) DICK E. ARROWSMITH,
By HENRY NEWBEGIN, *His Att'y.*
BENJAMIN B. KINGSBURY.
HENRY NEWBEGIN.

Taken and approved by me this third day of October, 1885.
(Signed) SELWYN N. OWEN,
Acting Chief Justice of the Supreme Court of Ohio.

Filed Oct. 3d, 1885, in supreme court of Ohio.
J. W. CRUIKSHANK, *Clerk.*

23 *Assignments of Errors.*

Supreme Court of the United States. Of October Term, 1885.

DICK E. ARROWSMITH, Plaintiff in Error,
vs.
AMELIA HARMONING, AS ADMINISTRATRIX OF THE ESTATE OF JOHN Frederick Harmoning, Amelia Harmoning, Lydia M. Harmoning, William F. Harmoning, Carl H. Harmoning, and Fritz H. Harmoning, Defendants in Error.

Now comes the said plaintiff in error by Henry Newbegin, his attorney, and says that there is manifest error in the record and proceedings in said cause in this:

First. That the supreme court of the State of Ohio erred in affirming the judgement of the district court of Defiance county in rendering a decision in favor of the validity of the authority and action of the probate court of Defiance county in its proceedings for sale of his lands, though the same were and are in violation of the provisions of the Constitution of the United States of America in this, that he was thereby deprived of his property without due process of law.

Second. That the said court erred in not rendering a judgement for plaintiff in error denying the validity of the said authority and action of said probate court as being in violation of the Constitution of the United States in depriving him of his property without due process of law.

Wherefore he prays that the said judgement of the supreme court of the State of Ohio may be reversed and he restored to all he has lost thereby.

HENRY NEWBEGIN,
Attorney for Dick E. Arrowsmith, Plaintiff in Error.

24 Supreme Court of the State of Ohio.

DICK E. ARROWSMITH
vs.
AMELIA HARMONING, Administratrix, &c., *et al.*

I, J. W. Cruikshank, clerk of the supreme court of the State of Ohio, do hereby certify that the above and foregoing contains the original writ of error, citation, and acknowledgement of service thereof, together with true copies of the record in this court, and the syllabus of the decision of the supreme court of the State of Ohio, and the opinion and judgment of the said court delivered and rendered in the case; also a copy of the supersedeas bond filed in my office, as well as original assignment of errors by the attorney for

the plaintift in error, in the case of Dick E. Arrowsmith *vs.* Amelia Harmoning, administratrix of the estate of John Frederick Harmoning, Amelia Harmoning, Lydia M. Harmoning, William F. Harmoning, Carl H. Harmoning, and Fritz H. Harmoning.

Witness my hand and the seal of said court this sixth day of October, A. D. 1885.

[Seal of the Supreme Court of the State of Ohio.]

J. W. CRUIKSHANK, *Clerk.*
By J. W. SLOCUM, *Deputy.*

25 [Endorsed:] In the Supreme Court of the United States. Transcript of record. Error to supreme court of Ohio. Dick E. Arrowsmith, plaintiff in error, *vs.* Amelia Harmoning *et al.* Henry Newbegin, attorney for pl'ff.

[Stamped:] Supreme Court U. S. Received Oct. 12, 1885. Clerk's office.

Endorsed on cover: Ohio supreme court. No. 1106. Dick E. Arrowsmith, plaintiff in error, *vs.* Amelia Harmoning, as administratrix of the estate of John Frederick Harmoning, deceased; Amelia Harmoning, Lydia M. Harmoning, *et al.* Filed October 16, 1885.

118-194

IN THE

SUPREME COURT OF THE UNITED STATES.

NO. 1106.

OCTOBER TERM, A. D. 1885.

DICK E. ARROWSMITH,

vs.

AMELIA HARMONING ET AL.

Error to the Supreme Court of Ohio.

PLAINTIFF'S BRIEF ON DEFENDANTS' MOTION TO DISMISS CAUSE.

HENRY NEWBEGIN,
B. B. KINGSBURY,
Counsel for Plaintiff in Error.

CHICAGO:
PRINTED BY THE CHICAGO LEGAL NEWS COMPANY, 175 MONROE STREET.
1886.

IN THE

SUPREME COURT OF THE UNITED STATES,

NO. 1106.

OCTOBER TERM, A. D. 1885.

DICK E. ARROWSMITH

vs.

AMELIA HARMONING ET AL.

In Error to the Supreme Court of Ohio.

Brief for Plaintiff in Error on Defendants' Motion to Dismiss Cause.

The original action in this case was brought by the plaintiff against the defendants' intestate, J. F. Harmoning, to recover possession of certain lands, and was an ordinary suit in ejectment. (Printed Record, page 4.)

The defendant claimed title to the lands in question as the purchaser thereof at judicial sale, made under order of the Probate Court of the county, on the petition of the guardian of the plaintiff, who at the time of the sale was a minor, aged six years; which sale and proceedings in the Probate Court the plaintiff claimed were absolutely void for the reason that the court had no jurisdiction to make the order of sale, the guardian not having given the sale bond required by law, and the Probate Court, *without power or authority for that purpose*, having undertaken in its order to dispense with

such bond. (See sections 27 and 28, quoted in opinion of Sup. Ct. of Ohio, printed Record, p. 10, and finding of fact that no sale bond was given or required, p. 6.)

The defendant had judgment in the Court of Common Pleas, and the plaintiff made a motion for a new trial on the grounds, among others, that the judgment was "*contrary to the law of the land,*" and that the plaintiff should have had judgment "*upon the facts as found by the court and the law of the land.*"

The plaintiff's motion for a new trial was overruled, and error taken to the (then) District Court, one assignment of error therein by the plaintiff being that the court below overruled the plaintiff's motion for a new trial, and another that "*according to the law*" judgment should have been for the plaintiff.

The District Court affirmed the judgment of the Common Pleas.

To reverse this judgment of affirmance of the District Court as well as the judgment of the Common Pleas, the plaintiff, now of age, filed his petition in error in the Supreme Court of the State, in which (Par. 3d) he directly alleges that "contrary to the provisions of the Constitution of "the United States of America, he has been deprived of his "property, without due process of law." (Printed Record p. 3.)

The Supreme Court of the State of Ohio, by its judgment rendered therein, affirmed the judgment of the District Court, to reverse which judgment this writ of error is herein prosecuted, and it is the defendant's motion to dismiss this writ which we are now here to resist.

It is intimated in the opinion of the Supreme Court of Ohio, (Record, p. 11), as well as in *Maurr* v. *Parish*, 26 Ohio St. 436, that the order of sale of the Probate Court might

be reversed by a proceeding in error, but counsel is firm in the opinion that error does not lie in Ohio, *on petition of the minor* to reverse such proceedings, and the Circuit Court of Defiance county have recently so held in the case of *Arrowsmith* v. *Hardy*, (XV Ohio Law Journal, No. 345, for April 12, 1886), but for the purpose of having the law on this point settled in Ohio, we have taken this case to the Supreme Court of the State where it is now pending.

In this suit too the Court of Common Pleas held that no recovery could be had on the original bond *given by this very guardian* (who sold the plaintiff's land in the case at bar,) *for the proceeds of such sale*, but that the *minor must look to the sale bond*, which in this case *the Probate Court dispensed with*. But if such proceedings could be reviewed on error on the petition of the minor after arriving of age, and reversed, no benefit would result to him as under the law of Ohio, "such reversal shall not defeat or affect the title of the purchaser." (R. S. Ohio, 1880, Sec. 5409.)

Hence, the plaintiff being a citizen of Nevada, in October, 1884, by his counsel, filed an original bill in the Circuit Court of the United States, for the Northern District of Ohio, to vacate and annul the order of the Probate Court in this proceeding, for the sale of the lands in question. To this bill the defendant's attorneys (now here moving to dismiss our writ of error) demurred, and the court, on hearing, sustained the demurrer and dismissed the complainant's bill. We appealed to this Supreme Court, *concurrently with taking our writ of error in this case*, for the purpose of having both cases at hearing here at the same time. The case on appeal is the next after this, No. 1,107, and, as the court will see on examination of the printed record, involves *the same question of the jurisdiction of the Probate Court*

to make the order of sale, by which the plaintiff was deprived of his land.

The question involved on this motion is not whether in law the act of the Probate Court in dispensing with the sale bond and ordering the sale, thereby depriving the plaintiff of his property at the age of six years, helpless in the power and presumed to be under the protection of the court, was, against that due process of law, guaranteed by the Constitution of the United States, but whether we may be permitted to argue that point in connection with our appealed case, which, in any event, will stand for hearing; and we may well say to this Court as Themistocles said to Eurybiades, "Strike if you will, but hear." If the Supreme Court of Ohio shall reverse the above case of *Arrowsmith* v. *Hardy*, and this Court sustain the decision of the Circuit Court on appeal in case No. 1107, *then* the plaintiff in error here is without remedy; and will this Court, in the justness of which rests the only hope of the plaintiff for the recovery of the property of which he has been stripped, summarily dismiss his suit without a hearing? The defendants suffer nothing by the delay; *they are in possession of the property*, and the plaintiff has given bond for costs of suit. (Record, p. 13.)

Responding briefly to the points made in defendants brief filed here on their motion, we say in answer to the first point, that, "No federal question was properly brought before the Supreme Court of Ohio or decided by it." Few if any of the cases cited by defendants' counsel under this point have any bearing on it unless against their claim. It is well known that error from this Court lies only to the State court of last resort. In this case that court of last

resort was the *Supreme Court of Ohio*, and it was sufficient to raise the federal question *first in that Court;* it was clearly made there and the attention of the Court called to it in the 3d assignment of error in plaintiff's petition in error to the District Court, (printed Record, p. 3,) and counsel knows that this assignment of error, especially that part of it, that the plaintiff had been "deprived of his property without due "process of law, contrary to the provisions of the Constitution of the United States," was specially "brought to the attention of that Court," for he was there and argued it orally to the court in the presence of the defendants' counsel who have filed this brief for the defendants.

This question is fully recited in the writ of error to this Court (Record, p. 1) and by the allowance of the writ by the chief justice of the State, certified to by him. But this federal question that the order of the Probate Court was against, that due process of law guaranteed by the Constitution of the United States, appears of record in all the proceedings from the beginning. In the finding of facts by the Court of Common Pleas (Record, p. 6) is the finding that the Probate Court *dispensed with the sale bond*, and that without requiring any such bond "and without any such additional "bond having been given, the said Probate Court * * * "ordered said guardian to sell said lands."

The motion for a new trial in the common pleas assigns as cause therefor that the judgment of the Common Pleas "is contrary to the law of the land," (Record, p. 7), and it is alleged in plaintiff's petition in error in the District Court, that in overruling this motion the Court of Common Pleas erred (3rd assignment, Record, p. 9).

It has been repeatedly held by this court that the phrase, "The law of the land," is equivalent to, "Due process of

law," but we cite in support of this only, the authorities cited by defendant's counsel.

See *Walker* v. *Suavinet*, 92 U. S., *93*.

Opinion of Justice Field in *Mo. Pac. Ry. Co.* v. *Humes*, 115 U. S., *519*.

We think it clear from the above that in the Supreme Court of Ohio, in this case, there was drawn in question an authority under the State of Ohio, exercised by the Probate Court in granting the order of sale, on the ground that such authority was repugnant to the Constitution of the United States, and also was drawn in question a right and privilege of the plaintiff, guaranteed by the Constitution of the United States. If so the decision of the Supreme Court of Ohio, in affirming the judgment of both the lower courts, was necessarily against the claim of the plaintift under the constitution, otherwise these judgments must have been reversed; for if the exercise of this authority by the Probate Court in dispensing with the sale bond and ordering the plaintiff's land sold without such bond, was not in accordance with the "*law of the land*," or that due process of law guaranteed by the constitution, *then it was without jurisdiction to order the sale*, and the plaintiff should have recovered in his ejectment suit in the Court of Common Pleas. And so the Chief Justice of the Supreme Court of Ohio, understood it in allowing this writ. (Printed Record, p. 1.)

Brown v. *Colorado*, 106 U. S. *97*. Opinion of Chief Justice Waite, citing *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116, 143 and *Crowell* v. *Randall*, 10 Peters, 368, 398.

Chouteau v. *Gibson*, 111 U. S. 200, 1st par. of the opinion.

We need make no further response than the above to the 2nd proposition of the defendant's brief.

As to their 3rd proposition we hardly comprehend the defendant's counsel. How a right guaranteed by the Constitution of the United States, if involved in the record, can be a "*frivolous*" question we can not understand; the loss of all the plaintiff's property at the age of six years, when utterly incapable to protect himself, through an order of the Probate Court, made contrary to "the law of the land" and against that "due process of law" guaranteed by the constitution, has been no "*frivolous*" matter to him; nor have the struggles of his counsel for years in the courts to recover it back been a "frivolous" matter to them; and while we appreciate the kindness of counsel for the defendants in offering to submit *their case* "without further argument" we prefer to argue *our case* further, and for that purpose respectfully asked the court to pass this motion for further argument until final hearing of this case in connection with No. 1107.

HENRY NEWBEGIN,
For Plaintiff in Error.

118-194

MAR 11 1886
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1885.

No. 1106.

DICK E. ARROWSMITH, *Plaintiff in Error,*

VS.

AMELIA HARMONING, AS ADMINISTRATRIX OF THE ESTATE OF JOHN FREDERICK HARMONING, DECEASED, AMELIA HARMONING, ET AL., *Defendants in Error.*

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR DEFENDANTS IN ERROR,

On Motion to dismiss Writ of Error.

WILLIAM C. COCHRAN,
HENRY B. HARRIS,
Counsel for Defendants in Error.

118-194

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In Error to the Supreme Court of the State of Ohio.

BRIEF FOR DEFENDANTS IN ERROR,

On Motion to dismiss Writ of Error.

STATEMENT OF CASE.

The original action was brought in the Court of Common Pleas of Defiance County, Ohio, to recover possession of 640 acres of land lying in that county, which formerly belonged to plaintiff in error, but which was purchased by John Frederick Harmoning (deceased husband and father of defendants in error), at sales made by the guardian of said plaintiff in error, under order of the Probate Court of said Defiance County, when plaintiff in error was an infant.

The case was tried on submission to the Court, a jury being waived by both parties, and by request of both parties the Court stated the findings of fact and conclusions of law separately, and they may be found on pages 6 and 7 of the Record. No exception was taken to the findings of fact.

The Court found that a petition for the sale of said real estate, in due form, had been filed in the Probate Court of Defiance county by Edward H. Gleason, the duly appointed guardian of said Dick Evans Arrowsmith, (then a minor,) and that all the proceedings in said Probate Court had been duly and lawfully had down to and including the confirmation of the appraisement of the land made by duly appointed appraisers, and that

"Thereupon, the said Probate Court proceeded to and did find and order as follows, to-wit: '*Said Edward H. Gleason, having, upon his appointment as such guardian, given bond with reference to the value and sale of the said real estate of his said ward, which bond is now adjudged to be sufficient for the purpose hereof, therefore the giving of additional bond is hereby dispensed with;*'" and that "thereupon, without ordering or requiring said guardian to give any further or additional bond, and without any such additional bond having been given, the said Probate Court, on the 10th day of November, A.D. 1869, ordered said guardian to sell said lands, or any parcel thereof, at private sale, but at not less than the appraised value thereof," etc.; and that, pursuant to said order of said Probate Court, said guardian sold the lands in controversy to said Harmoning, at the dates, for the sums and of the number of acres following, to-wit:

November	15th, 1869,	153.25	acres for	$1,537 50
May	3d, 1873,	87	" "	872 10
December	4th, 1874,	400	" "	6,000 00

and each of said sales was duly reported to and confirmed by said Probate Court, and, upon the order of said Court, said guardian executed in due form and delivered to said Harmoning deeds for the same, who thereupon paid for the same, in accordance with the order of the Court, and took possession of the land and retained it until the commencement of said action. (*Record 6.*)

The only irregularity complained of in all the proceedings is the finding and adjudication of the Probate Court that a sufficient bond had already been given with a view to the sale of the real estate and that therefore no further bond was required, and the sole question was whether this irregularity rendered the sales, subsequently made by the guardian under the order of the Court

and afterwards approved and confirmed by the Court, *null and void*, and this depended upon the proper construction of the Statutes of Ohio relating to guardian's sales and upon the general law applicable to judicial sales.

No question as to the constitutionality of the Ohio Statutes giving to Probate Courts jurisdiction in the sale of lands by guardians was raised by the pleadings or in the argument in the Court below, and plaintiff in error claimed no title, right, or privilege under the first section of the Fourteenth Amendment of the Constitution of the United States. The decision of the Common Pleas Court was in favor of Harmoning.

Plaintiff in error then filed a motion for a new trial for the following reasons:

"1. Error of law occurring during the trial, in refusing to admit the testimony offered at the trial to which the plaintiff at the time excepted.

"2. That the conclusions of law as found by the Court are contrary to the findings of fact and not the law of the case.

"3. The judgment of the Court is contrary to the law of the land.

"4. The judgment of the Court should have been for the plaintiff instead of for the defendant, upon the facts as found by the Court and the law of the land." (*Record p. 7.*)

This motion being overruled, plaintiff in error then filed his petition in error in the District Court of said Defiance county, which had power to reverse or affirm the judgment of the Court below, on proceedings in error, and assigned as reasons why the judgment of the Common Pleas Court should be reversed:

"1st. That said Court erred in its rulings and orders made during the trial of this suit and excepted to at the time by this plaintiff.

"2d. That the said Court of Common Pleas erred in its conclusions of law as set forth in its findings hereunto annexed.

"3d. That the said Court of Common Pleas erred in overruling and in not sustaining the plaintiff's motion for a new trial of this case.

"4th. That the said Court of Common Pleas erred in render-

ing judgment for the defendant in error, when, according to the law and the facts, judgment should have been rendered for this plaintiff and against the defendant." (*Record pp. 8 and 9.*)

Up to this time there was not the faintest suggestion that a federal question was involved or that plaintiff in error was being denied any right, title, or immunity, claimed by him under the Fourteenth Amendment of the Constitution of the United States. The District Court passing upon the same questions that were argued before the Common Pleas Court, affirmed the judgment of that Court.

Plaintiff in error then filed his petition in error in the Supreme Court of Ohio, and, realizing by this time the possibility of defeat in that Court, attempted to arrange for an appeal to the Supreme Court of the United States, by now charging for the first time:

"3d. That, by affirming the judgment of the Court of Common Pleas therein by said District Court, this plaintiff in error was deprived of his right of trial by jury, contrary to the provisions of the Constitution of this State, and deprived of his property without due process of law, contrary to the provisions of (the) Constitution of the United States of America." (*Record p. 3.*)

No notice was called to this assignment of error in the brief or argument of council for plaintiff in error in the Supreme Court of Ohio, and that Court neither decided, nor paid any attention to the question thus sought to be raised. See their opinion printed on pp. 9–12 of the Record. They simply affirmed the judgment of the District Court, following and approving their own previous decision in a similar case, *Mauarr* v. *Parrish*, 26 O.S. 636, and in due time plaintiff sued out this writ of error.

ARGUMENT.

I.

No federal question was properly brought before the Supreme Court of Ohio, or decided by it.

In *Walker* v. *Sauvinet*, 92 U. S. 91; *Foster* v. *Kansas*, 112 U. S. 201, 205; *Head* v. *Amoskeag Manufacturing Co.*, 113 U. S. 12; *Chicago Life Insurance Co.* v. *Needles*, 113 U. S. 574, 578;

Missouri Pacific Railway Co. v. *Humes*, 115 U. S. 512, 514; *Campbell* v. *Holt*, 115 U. S. 620, 622; and, presumably, in every other case in which this Court has taken jurisdiction the federal question, on which such jurisdiction depends, was raised in the Court of original jurisdiction, at or before the trial term and before entry of final judgment.

The record in this case shows that no such question was raised in the Common Pleas Court of Defiance county, and it could not be assigned for error that it had erred in affirming the validity of the authority exercised by the Probate Court, on the ground that such authority was not repugnant to the Constitution, because nobody said it was; nor could it be assigned for error that the Common Pleas Court had decided against any title, right, or privilege of plaintiff in error claimed under the first section of the Fourteenth Amendment to the Constitution of the United States, because no such claim was made in any manner, shape, or form.

When the District Court affirmed the judgment of the Common Pleas Court, it was sitting as a court of error and passed on such questions only as were presented to it by the petition in error and the bill of exceptions. It was not assigned for error in that Court, that plaintiff had been deprived of his property without due process of law, contrary to the provisions of the Constitution of the United States.

It is well settled in Ohio, that the Supreme Court when asked to reverse the judgment of the District Court, rendered when that Court was sitting as a court of error, will not consider errors which have not been assigned in and properly brought to the attention of that Court.

Davis v. *Hines*, 6 O.S. 473, 478.
Pollock v. *Cohen*, 32 O.S. 514, 518, 519.
Insurance Co. v. *McGookey*, 33 O.S. 555, 563.

The 3d assignment of error, being made for the first time after the judgment of both Common Pleas and District Court had been announced, came too late and could not be considered by the Supreme Court. As that Court did not have any federal question

ing judgment for the defendant in error, when, according to the law and the facts, judgment should have been rendered for this plaintiff and against the defendant." (*Record pp. 8 and 9.*)

Up to this time there was not the faintest suggestion that a federal question was involved or that plaintiff in error was being denied any right, title, or immunity, claimed by him under the Fourteenth Amendment of the Constitution of the United States. The District Court passing upon the same questions that were argued before the Common Pleas Court, affirmed the judgment of that Court.

Plaintiff in error then filed his petition in error in the Supreme Court of Ohio, and, realizing by this time the possibility of defeat in that Court, attempted to arrange for an appeal to the Supreme Court of the United States, by now charging for the first time:

"3d. That, by affirming the judgment of the Court of Common Pleas therein by said District Court, this plaintiff in error was deprived of his right of trial by jury, contrary to the provisions of the Constitution of this State, and deprived of his property without due process of law, contrary to the provisions of (the) Constitution of the United States of America." (*Record p. 3.*)

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Missouri Pacific Railway Co. v. *Humes*, 115 U. S. 512, 514; *Campbell* v. *Holt*, 115 U. S. 620, 622; and, presumably, in every other case in which this Court has taken jurisdiction the federal question, on which such jurisdiction depends, was raised in the Court of original jurisdiction, at or before the trial term and before entry of final judgment.

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When the District Court affirmed the judgment of the Common Pleas Court, it was sitting as a court of error and passed on such questions only as were presented to it by the petition in error and the bill of exceptions. It was not assigned for error in that Court, that plaintiff had been deprived of his property without due process of law, contrary to the provisions of the Constitution of the United States.

It is well settled in Ohio, that the Supreme Court when asked to reverse the judgment of the District Court, rendered when that Court was sitting as a court of error, will not consider errors which have not been assigned in and properly brought to the attention of that Court.

Davis v. *Hines*, 6 O.S. 473, 478.
Pollock v. *Cohen*, 32 O.S. 514, 518, 519.
Insurance Co. v. *McGookey*, 33 O.S. 555, 563.

The 3d assignment of error, being made for the first time after the judgment of both Common Pleas and District Court had been announced, came too late and could not be considered by the Supreme Court. As that Court did not have any federal question

before it and did not in fact decide any federal question, this Court is without jurisdiction.

Kennard v. *Louisiana*, id. 480, 481, 483.
Missouri v. *Lewis*, 101 U.S. 22, 30–33.
Hoyt v. *Sprague*, 103 U.S. 613, 632–634.
Brown v. *Colorado*, 106 U.S. 95, 97, 98.
Susquehanna Boom Co. v. *West Branch Boom Co.*, 110 U.S. 57, 58.
Chouteau v. *Gibson*, 111 U.S. 200, 201.
Santa Cruz Co. v. *Santa Cruz R.R. Co.*, 111 U.S. 361, 362.
Adams County v. *Burlington & Missouri Ry. Co.*, 112 U.S. 123, 127, 129.
Detroit R.R. Co. v. *Guthard*, 114 U.S. 133, 136.
Boatman's Savings Bank v. *State Savings Association*, 114 U.S. 265, 268.

II.

No such questions as those specified in the writ of error were assigned for error, even in the Supreme Court of Ohio, and therefore this Court cannot consider them.

In his 3d assignment of error, in his petition in error in the Supreme Court of Ohio, plaintiff says, in effect, that he was "deprived of his property without due process of law, contrary to (the) Constitution of the United States of America" *by said District Court, by affirming the judgment of the Court of Common Pleas.* (*Record, p. 3.*)

Being deprived of his property by the District Court of Defiance County, Ohio, by affirming the judgment of the Court of Common Pleas, in a proceeding instituted by himself, is one thing—the only thing claimed in the Supreme Court of Ohio—and being deprived of his property by the Probate Court of Defiance County, Ohio, in a proceeding instituted by his guardian, is quite another. The very equivocal "assignments of errors" (*Record, p. 14*), by which counsel attempts to supply the missing link and to establish a relationship between two utterly inconsistent things, serve to show clearly that the alleged federal

questions were never seriously considered prior to the decision in the Supreme Court of Ohio, and that counsel had no distinct idea of what federal questions, if any, were involved.

Having failed to bring the questions specified in the writ of error to the attention of the Supreme Court of Ohio, he cannot, of course, ask this Court to consider them.

III.

If the Court should be of opinion that they have jurisdiction, nothwithstanding the facts above pointed out, we are willing to submit the questions on which such jurisdiction depends, without further argument, as they have been many times decided by this Court, and are too frivolous to require extended discussion.

WILLIAM C. COCHRAN,
HENRY B. HARRIS,
Counsel for Defendants in Error.

118-196

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 200.

THE IRON SILVER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ELGIN MINING AND SMELTING COMPANY, JOHN W. NEWTON, CHARLES DENNISON, M. B. CARPENTER, G. L. HAVENS, J. W. BEEMAN, AND WILLIAM HAVENS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED MARCH 6, 1883.

SUPREME COURT OF THE UNITED STATES.

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1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 29th day of June, A. D. 1882, came The Elgin Mining and Smelting Company, John W. Newton, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens, by Messrs. Markham, Patterson & Thomas, their attorneys, and filed in said court their complaint and sued out of and under the seal of said court a writ of summons against The Iron Silver Mining Company, and the said complaint is in words and figures as follows, to wit:

Complaint.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the Circuit Court of the 8th Judicial Circuit of the United States in and for the District of Colorado.

THE ELGIN MINING AND SMELTING COMPANY, a Corporation, JOHN W. Newton, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens, Complainants,

vs.

THE IRON SILVER MINING COMPANY, a Corporation, Defendant.

The Elgin Mining and Smelting Company, a corporation, organized and existing under and by virtue of the laws of the State of Illinois, a citizen thereof, and authorized to do and doing business in the State of Colorado, and John W. Newton, Charles
2 Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens, citizens of the State of Colorado, plaintiffs in this suit, by Markham, Patterson, Thomas & Lyles, their attorneys, complain of The Iron Silver Mining Company, citizen of the State of New York, incorporated by the name aforesaid by the said State, and having their principal place of business therein, defendant in this suit, and allege:

That the amount involved in this controversy exceeds the sum of five hundred dollars, exclusive of costs; that the plaintiffs are now and long since have been the owners of and entitled to the exclusive possession and enjoyment of all that certain lode mining claim situate in California Gulch, in California mining district, county of Lake, and State of Colorado, known as and called the Gilt Edge Lode, which said lode claim is more particularly descrided by meet-s and bounds, to wit: Beginning at corner No. (1) one, same as corner No. (2) two of Wm. Reddick; thence south (72°) seventy-two degrees west two hundred feet to corner No. (2) two; thence north (18°) eighteen degrees west one hundred feet to corner No. (3) three, same as corner No. (13) thirteen of Stone Lode; thence north (89°) eighty-nine degrees (40′) forty minutes east one hundred ninety-seven feet to corner No. (4) four, same as corner No. (1) [one] of A. Y.; thence north (45°) forty-five degrees east three hundred fifty-seven and $\frac{7}{10}$

feet to corner No. (5) five (same as northeast corner of Minie); thence north (12°) twelve degrees west one hundred twelve feet to corner No. (6) six; thence north (45°) forty-five degrees east seven hundred twenty feet to corner No. (7) seven; thence south (18°) eighteen degrees east three hundred feet to corner No. (8) eight; thence
3 south (46°) forty-six degrees west ten hundred sixty-four feet to corner No. (9) (same as corner No. (32) thirty-two, survey No. 281); thence north (18°) eighteen degrees west one hundred twenty-five feet to corner No. (1) one, the place of beginning; that the plaintiffs own said mining premises by divers mesne conveyances from the original locators thereof by virtue of a full compliance with the laws of the United States and the State of Colorado in such case made and provided and by virtue of a receiver's receipt therefor.

That said Gilt Edge Lode Mining Claim is of great value to plaintiffs, to wit, of the value of one million dollars; that plaintiffs long have been and are now entitled to the possession of the said mining premises hereinbefore described, and each and every part thereof.

That the defendant, on to wit, the — day of June, A. D. 1882, by means of a drift incline or tunnel driven into the said Gilt Edge Lode Mining Claim, from the southwest and entering underneath the same at a point about — feet from the —— line thereof, have entered into and upon the said Gilt Edge Lode Mining Claim and have ousted the plaintiffs from the possession of all that part of the said Gilt Edge Lode Mining Claim embraced in and by the said drifts, inclines, and tunnels, so by it as aforesaid made, and now in and upon said claim, and have wrongfully withheld, and still do wrongfully withhold, possession thereof, from plaintiffs, to the damage of plaintiffs in the sum of fifty thousand dollars.

That so much of said workings of the said defendant as there is on and upon the said Gilt Edge Lode Mining Claim, and from which the plaintiffs have been ousted as aforesaid, are described as
4 follows, to wit:

That the defendant company, by means of the said drifts, inclines, levels, etc., have taken, removed, carried away, and converted to their own use large quantities of the mineral ores belonging to said mine and to plaintiffs, and is of great value, to wit, of the value of fifty thousand dollars. Wherefore the plaintiffs pray judgment against the defendant—

1st. For the sum of fifty thousand dollars damages as aforesaid.

2d. For the sum of fifty thousand dollars for ore so as aforesaid taken and converted by the defendant.

3d. For the recovery of the possession of said premises.

4th. For costs of suit.

(Signed) By MARKHAM, PATTERSON, THOMAS & LYLES,
Pl'ffs' Att'ys.

Endorsed: 963. In the circuit court of the 8th judicial circuit of the United States in and for the district of Colorado. The Elgin

Mining & Smelting Co. *et al. vs.* The Iron Silver Mining Company. Complaint in ejectment. Filed June 29, 1882. (S'g'd) Edward F. Bishop, clerk.

And the said summons is in words and figures as follows, to wit:

Summons.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

THE ELGIN MINING AND SMELTING COMPANY, JOHN W. NEWTON, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens, Plaintiffs,

versus

THE IRON SILVER MINING COMPANY, Defendant.

Complaint filed in the clerk's office this 29th day of June, A. D. 1882.

The President of the United States of America to the above-named defendant, Greeting:

You are hereby notified that an action has been brought in said court by the above-named plaintiffs against you as defendant to recover the possession of certain specific real property situate in California Gulch, in California mining district, county of Lake, and State of Colorado, to wit, the Gilt Edge Lode, for the sum of fifty thousand dollars damages for ores taken and carried away, etc., by the said defendants from said lode; for the further sum of fifty thousand dollars for the wrongful ouster and withholding of said premises, and for the costs of this suit, as more fully set forth in the complaint on file herein, and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do the said plaintiffs will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness The Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 29th day of June, A. D. 1882, and of the Independence of the United States the 106th year.

[Seal Circ't C't U. S., Colo..]

(S'g'd) EDWARD F. BISHOP, *Clerk.*

feet to corner No. (5) five (same as northeast corner of Minie); thence north (12°) twelve degrees west one hundred twelve feet to corner No. (6) six; thence north (45°) forty-five degrees east seven hundred twenty feet to corner No. (7) seven; thence south (18°) eighteen degrees east three hundred feet to corner No. (8) eight; thence
3 south (46°) forty-six degrees west ten hundred sixty-four feet to corner No. (9) (same as corner No. (32) thirty-two, survey No. 281); thence north (18°) eighteen degrees west one hundred twenty-five feet to corner No. (1) one, the place of beginning; that the plaintiffs own said mining premises by divers mesne conveyances from the original locators thereof by virtue of a full compliance with the laws of the United States and the State of Colorado in such case made and provided and by virtue of a receiver's receipt therefor.

That said Gilt Edge Lode Mining Claim is of great value to plaintiffs, to wit, of the value of one million dollars; that plaintiffs long have been and are now entitled to the possession of the said mining premises hereinbefore described, and each and every part thereof.

That the defendant, on to wit, the — day of June, A. D. 1882, by means of a drift incline or tunnel driven into the said Gilt Edge Lode Mining Claim, from the southwest and entering underneath the same at a point about — feet from the —— line thereof, have entered into and upon the said Gilt Edge Lode Mining Claim and have ousted the plaintiffs from the possession of all that part of the said Gilt Edge Lode Mining Claim embraced in and by the said drifts, inclines, and tunnels, so by it as aforesaid made, and now in and upon said claim, and have wrongfully withheld, and still do wrongfully withhold, possession thereof, from plaintiffs, to the damage of plaintiffs in the sum of fifty thousand dollars.

That so much of said workings of the said defendant as there is on and upon the said Gilt Edge Lode Mining Claim, and from which the plaintiffs have been ousted as aforesaid, are described as
4 follows, to wit:

That the defendant company, by means of the said drifts, inclines, levels, etc., have taken, removed, carried away, and converted to their own use large quantities of the mineral ores belonging to said mine and to plaintiffs, and is of great value, to wit, of the value of fifty thousand dollars. Wherefore the plaintiffs pray judgment against the defendant—

1st. For the sum of fifty thousand dollars damages as aforesaid.

2d. For the sum of fifty thousand dollars for ore so as aforesaid taken and converted by the defendant.

3d. For the recovery of the possession of said premises.

4th. For costs of suit.

(Signed) By MARKHAM, PATTERSON, THOMAS & LYLES,
Pl'ffs' Att'ys.

Endorsed: 963. In the circuit court of the 8th judicial circuit of the United States in and for the district of Colorado. The Elgin

Mining & Smelting Co. *et al. vs.* The Iron Silver Mining Company. Complaint in ejectment. Filed June 29, 1882. (S'g'd) Edward F. Bishop, clerk.

And the said summons is in words and figures as follows, to wit:

Summons.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

THE ELGIN MINING AND SMELTING COMPANY, JOHN W. NEWTON, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens, Plaintiffs,

versus

THE IRON SILVER MINING COMPANY, Defendant.

Complaint filed in the clerk's office this 29th day of June, A. D. 1882.

The President of the United States of America to the above-named defendant, Greeting:

You are hereby notified that an action has been brought in said court by the above-named plaintiffs against you as defendant to recover the possession of certain specific real property situate in California Gulch, in California mining district, county of Lake, and State of Colorado, to wit, the Gilt Edge Lode, for the sum of fifty thousand dollars damages for ores taken and carried away, etc., by the said defendants from said lode; for the further sum of fifty thousand dollars for the wrongful ouster and withholding of said premises, and for the costs of this suit, as more fully set forth in the complaint on file herein, and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do the said plaintiffs will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness The Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 29th day of June, A. D. 1882, and of the Independence of the United States the 106th year.

[Seal Circ't C't U. S., Colo..]

(S'g'd) EDWARD F. BISHOP, *Clerk.*

6 *Proof of Service.*

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

LEADVILLE, *July* 20th, A. D. 1882.

I hereby certify that I received the within writ on the 3d day of July, A. D. 1882, and that I have personally served the same upon the said defendant this 3d day of July, A. D. 1882, by delivering to W. Ames, gen'l manager Iron Silver Mining Co., a copy of the within, near Leadville, Lake Co., Colo., personally, a true copy of the within writ at the day and time as follows: 3d day of July, A. D. 1882.

This writ, therefore, returned served, as the law directs, this 21st day of July, A. D. 1882.

(Signed) WALTER A. SMITH, *Marshal*,
By CY. B. AYERS,
Special Deputy Marshal.

[Endorsed:] Gen. No. 963. Circuit court of the United States for the district of Colorado. The Elgin Mining and Smelting Company *et al.*, plaintiffs, *vs.* The Iron Silver Mining Company, defendant. Summons. Filed this 21st day of July, A. D. 1882. Edward F. Bishop, clerk, by Wm. E. Rogers, deputy clerk. Markham, Patterson, Thomas & Lyles, of Denver, attorney- for plaintiff.

7 And afterwards, and on, to wit, the 7th day of August, A. D. 1882, came the said defendant, by Jonas Seely, Esq., its attorney, and filed in said court and in said cause its demurrer to the complaint heretofore filed herein, and the said demurrer is in words and figures as follows, to wit:

Demurrer to Complaint.

In the Circuit Court of the United States, Eighth Circuit and District of Colorado.

THE ELGIN MINING AND SMELTING COMPANY, JOHN W. NEWTON, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens, Plaintiffs,

vs.

THE IRON SILVER MINING COMPANY, Defendant.

And now comes the above-named defendant, The Iron Silver Mining Company, and demurs to the plaintiffs' complaint herein, and for cause of demurrer says:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That said plaintiffs in their complaint have not set forth the nature or extent of their supposed estate in the property sued for as required by the provisions of section 249 of the civil practice act of the State of Colorado.

3. That said complaint is ambiguous, unintelligible, and uncertain in this, while said complaint alleges an ouster of plaintiffs by

defendant from some parts of the Gilt Edge claim therein-
8 after to be described, said description of said parts is not inserted in said complaint or otherwise given.

4. That several causes of action have been improperly united in said complaint, viz., an action to recover specific real property with an action to recover damages for the alleged taking by defendant from said real property of ore and converting the same to the use of defendant.

And defendant prays judgment, etc.

(S'g'd) JONAS SEELY,
Attorney for Defendant.

Endorsed: 963. In U. S. circuit court, eighth circuit, district of Colo. The Elgin Mining and Smelting Company *et al. vs.* The Iron Silver Mining Co. Demurrer to complaint. Filed Aug. 7, 1882. (S'g'd) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 20th day of October, A. D. 1882, the same being one of the regular juridical days of the October term, A. D. 1882, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Plaintiff Granted Leave to Amend Complaint.

THE ELGIN MINING AND SMELTING COMPANY *et al.*

vs.

THE IRON SILVER MINING COMPANY.

For possession of specific real property and for damages.

9 At this day come the said plaintiffs, by V. D. Markham, Esq., their attorney, and thereupon, on their motion, it is ordered that they have leave to amend their complaint herein and to file a supplemental complaint on or before Saturday, the 21st instant.

And afterwards and on, to wit, the *the* 21st day of October, A. D. 1882, came again the said plaintiffs, by their attorneys aforesaid, and filed in said court and in said cause their amended complaint against the said defendant. And the said amended complaint is in words and figures as follows, to wit:

Amended Complaint.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States in and for said District.

THE ELGIN MINING AND SMELTING COMPANY, a Corporation, JOHN W. Newton, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens, Plaintiffs,

vs.

THE IRON SILVER MINING COMPANY, a Corporation, Defendant.

The plaintiffs, by leave of court first had and obtained, present this their amended and supplemental complaint, and thereupon complain and allege—

I. That the plaintiffs were, at the date of commencement of
10 this suit, and each of them now is, a citizen of the State of Colorado, and that the defendant was then and now is a citizen of the State of New York, and that the sum or value of the matters in controversy in this action exceed, exclusive of costs, the sum of five hundred dollars.

II. That on the 29th day of June, 1882, the plaintiffs commenced their action in this court against the defendant by the service of summons. That in and by their complaint on that day filed they claimed the right to occupy and possess the premises therein described as the Gilt Edge Lode by divers mense conveyances from the original locators thereof, by virtue of a full compliance with the laws of the United States and the State of Colorado in such case made and provided, and by virtue of a receiver's receipt therefor. That since the commencement of said action, to wit, on the 1st day of October, 1882, a patent for said Gilt Edge Lode and premises has been issued by the Government of the United States to the plaintiffs herein, conveying to said plaintiffs the fee-simple title to said Gilt Edge Lode and premises, to which patent plaintiffs beg leave to refer on the trial hereof in lieu of the receiver's receipt.

The plaintiffs further complain and allege that, at the date of commencement of this suit, for a long time prior thereto, and now, they were and are the owners of, and entitled to, the exclusive possession and enjoyment of all that certain lode mining claim situate in California Gulch, in California mining district, county of Lake and State of Colorado, known and called the Gilt Edge Lode, which said lode claim is more particularly described by metes and bounds as follows, to wit: Beginning at corner No. (1) one, same as corner No. (2) two of Wm. Reddick; thence south
11 seventy-two degrees west two hundred feet to corner No. two; thence north eighteen degress west one hundred feet to corner No. three (same as corner No. 13 of the Stone Lode); thence north eighty-nine degrees forty minutes east one hundred ninety-seven feet to corner No. 4 (same as corner No. 1 of A. Y.); thence north forty-five degrees east three hundred fifty-seven and $\frac{7}{10}$ feet to corner No. 5 (same as northeast corner of Minnie); thence

north twelve degrees west one hundred and twelve feet to corner No. six; thence north forty-five degrees east seven hundred and twenty feet to corner No. seven; thence south eighteen degrees east three hundred feet to corner No. eight; thence south forty-six degrees west ten hundred sixty-four feet to corner No. nine (same as corner No. 32, survey 281); thence north eighteen degrees west one hundred and twenty-five feet to corner No. one, the place of beginning.

That the plaintiffs own said mining premises by divers mesne conveyances from the original locators thereof by virtue of a full compliance with the laws of the United States and of the State of Colorado relating to mines and mining claims, and in fee, and by actual prior possession as a lode mining claim, located on the public domain of the United States.

That said Gilt Edge Lode mining claim is of great value to plaintiffs, to wit, of the value of one million dollars.

That the plaintiffs long have been and are now entitled to the possession of the said mining premises hereinbefore described, and each and every part thereof, as a lode mining claim, located and owned as above set forth.

That the defendant on, to wit, the 25th day of June, 1882, by means of drifts, inclines, and tunnels driven into the said Gilt Edge Lode mining claim from the southwest, and entering
12 underneath said lode claims, have entered without right into and upon the said Gilt Edge Lode mining claim so possessed and owned by plaintiff, and on the day and year aforesaid ousted the plaintiffs from possession of all that part of the said Gilt Edge claim embraced in and by the said drifts, inclines, and tunnels, so by the defendant, as aforesaid, made and run in and upon said claim, and have wrongfully withheld, and still do wrongfully and without right withhold, possession thereof from plaintiffs, to the damage of plaintiffs in the sum of fifty thousand dollars.

The plaintiffs further complain and allege that the defendant company, by means of drifts, inclines, levels, tunnels, and winzes by it run, excavated, and made in and upon the Gilt Edge Lode claim of plaintiffs on the 25th day of June, 1882, and from thence hitherto have taken, removed, carried away, and converted to its own use large quantities of silver, gold, and lead ores belonging to said lode claim and the plaintiffs, which ores so carried away and converted by defendant are of great value, to wit, of the value of fifty thousand dollars.

Wherefore plaintiffs pray judgment against the defendant.

First. For the recovery of the possession of said Gilt Edge Lode mining claim, and each and every part thereof.

Second. For the sum of fifty thousand dollars damages for the wrongful detention of said Gilt Edge Lode.

Third. For the sum of fifty thousand dollars for ores so as aforesaid taken and converted by defendant.

Fourth. For costs of suit.

(S'g'd) MARKHAM, PATTERSON,
THOMAS & LYLES.
M. B. CAPENTER,
Attorneys for Plaintiffs.

13 Endorsed: 963. Circuit court of the U. S., district of Colorado. The Elgin Mining and Smelting Company *et als. vs.* The Iron Silver Mining Co. Amended complaint. Filed Oct. 21, 1882. (S'g'd) Edward F. Bishop, clerk. Markham, Patterson, Thomas & Lyles and M. B. Carpenter, attorneys for plaintiffs.

And afterwards and on, to wit, the 30th day of October, A. D. 1882, came again the said defendant, by its attorney aforesaid, and filed in said court and in said cause its answer to the amended complaint heretofore filed herein; and the said answer is in words and figures as follows, to wit:

Answer to Amended Complaint.

In the Circuit Court of the United States, Eighth Circuit and District of Colorado. At Law.

THE ELGIN MINING AND SMELTING COMPANY, JOHN W. NEWTON, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens, Plaintiffs,

vs.

THE IRON SILVER MINING COMPANY, Defendant.

Now comes the above-named defendant, The Iron Silver Mining Company, and makes answer to the amended and supplemental complaint of the above-named plaintiffs, and answering—

14 First. Denies that the plaintiffs, or any or either of them, are or ever were citizens of the State of Colorado.

Second. Denies that since the commencement of this suit or at any time a patent for said Gilt Edge Lode and premises has been issued by the Government of the United States to the said plaintiffs, or either or any of them, or that the fee-simple title to said lode or premises has been conveyed to said plaintiffs, or either or any of them.

Third. Denies that at the commencement of this suit, or at any other time or now, plaintiffs, or either or any of them, were or are the owners of or entitled to the possession or enjoyment of all or any part of the claim, property, or premises described in said complaint as the Gilt Edge, or that they have any conveyance thereof from any one, or that they have complied with the laws of the United States or the laws of the State of Colorado, or have had prior possession of the same premises.

Fourth. Denies that plaintiffs are or ever have been entitled to the possession of said premises or any part thereof.

Fifth. Denies that defendants at any time wrongfully or unlawfully entered into or upon said premises, or any part thereof, or ever ousted plaintiffs therefrom or from any part thereof.

Sixth. Denies that defendant has damaged plaintiffs in any sum whatever.

Seventh. Denies that said defendant has taken, removed, carried away, or converted any ores belonging to said lode, claim, or the plaintiffs of any value whatever.

15 And for a further answer in this behalf defendant alleges and shows to the court:

Eighth. That defendant is the owner in fee and entitled to the possession under and by virtue of a patent therefor from the Government of the United States, of date May 24th, in A. D. 1877, of that certain surface lode mining claim property and premises situate in California, a mining district in Lake county, State of Colorado, called the Stone claim, bounded and described as follows, with magnetic variations at fifteen (15) degrees east, to wit: Beginning at corner No. 1, a limestone 6 x 8 x 9 inches in size, in mound of stones chiseled "1–217," from which a bald mountain near the head of Sacramento creek bears north eighty-two (82) degrees thirty (30) minutes east, a blazed pine tree fourteen (14) inches in diameter bears south eighteen (18) degrees ten (10) minutes east at the distance of sixteen (16) feet, and a blazed pine tree twelve (12) inches in diameter bears south thirty-five (35) degrees west at the distance of twenty-four (24) feet; thence from said corner No. 1 south eighty-three (83) degrees east four hundred (400) feet to road, five hundred (500) feet to bank of placer, five hundred and thirty (530) feet to corner No. 2, a pine post four (4) inches square in mound of stones, marked "2–217;" thence south eighteen (18) degrees east one hundred and twenty-one and two-tenths ($121\frac{2}{100}$) feet to corner No. 3, a pine post four (4) inches square, in mound of stones marked "3–217;" thence south forty-five (45) degrees six (6) minutes west one hundred and ninety-four and forty-seven hundredths ($194\frac{47}{100}$) feet to corner No. 4, a pine post four (4) inches square, marked "4–217;" thence north forty-eight (48) degrees forty-five (45)

16 minutes west ten and two hundredths ($10\frac{2}{100}$) feet to corner No. 5, a pine post four (4) inches square, marked "5–217;" thence south twenty-sixth (26) degrees forty (40) minutes west three hundred (300) feet to corner No. 6, a pine post four (4) inches square, marked "6–217," from which corner No. 2 of survey No. 218, made for the claim of Alvinus B. Wood, upon the rock lode bears north forty-eight (48) degrees forty-five (45) minutes west at the distance of one hundred and five and seven-tenths ($105\frac{7}{10}$) feet; thence from said corner No. 6 south forty-eight (48) degrees forty-five (45) minutes east two hundred and five and fifty-five hundredths ($205\frac{55}{100}$) feet to corner to No. 7, a pine post four (4) inches square, marked "7–217;" thence north forty-five (45) degrees six (6) minutes east two hundred and sixty (260) feet to corner No. 8, a pine post four (4) inches square, marked "8–217;" thence north along that boundary of survey made for the Oro Plata Lode three hundred and sixty (360) feet to corner No. 9, a pine post four (4) inches square, marked "9–217;" thence east along north boundary of said survey made for the Oro Plata lode fifty (50) feet to corner No. 10, a pine post four (4) inches square in mound of stones, marked "10–217;" thence south along east boundary of said survey made for the Oro Plata Lode three hundred and ten and eighteen hundredths ($310\frac{18}{100}$) feet to corner No. 11, a pine post four (4) inches square, marked "11–217;" thence north forty-five (45) degrees six (6) minutes east three hundred and twenty-three and forty-five hundredths ($323\frac{45}{100}$) feet to corner No.

12, a pine post four (4) inches square, marked "12–217;" thence north eighteen (18) degrees west four hundred and eighty-five and thirty-two hundredths ($485\frac{32}{100}$) feet to corner No. 13, a pine post four (4) inches square, in mound of stones marked "13–227; thence north
17 eighty-three (83) degrees west, six hundred and thirteen and ninety-nine hundredths ($613\frac{99}{100}$) feet to corner No. 14, a pine post four (4) inches square marked "14–217;" thence south twenty-six (26) degrees forty (40) minutes west along easterly boundary of survey No. 216, made for the claim of Alvinus B. Wood, upon the Wood lode, three hundred and eight and fifty-eight hundredths ($308\frac{58}{100}$) feet to corner No. 5 of said survey No. 216, from which U. S. locating monument bears north sixty-three (63) degrees thirty (30) minutes west at the distance of ninety-six hundred and thirty-three (9,633) feet, three hundred and eighteen and fifty-eight hundredths ($318\frac{58}{100}$) feet to the place of beginning, containing nine (9) acres and eighteen hundredths ($\frac{18}{100}$) of an acre of land, more or less, and of a certain vein, lode, or ledge therein known and called the Stone vein, lode, or ledge, extending the entire length of said claim from north to south fifteen hundred feet, linear measurement, more or less, throughout its entire depth, although it does enter the lands adjoining.

Ninth. That said vein, lode, or ledge is a vein, lode, or ledge of rock in place bearing iron, lead, and silver in large quantities, and is valuable on account thereof.

Tenth. That the top apex and outcrop of said vein, lode, or ledge exists and is found in said Stone surface claim throughout its entire extent from north to south between walls of rock in place, a limestone foot wall, and a porphyry hanging wall.

Eleventh. That the true strike of said vein, lode, or ledge is north and south, and it has a dip to the east at an angle of 15° below the plain of the horizon.

Twelfth. That said vein, lode, or ledge on its dip aforesaid,
18 within vertical planes drawn downward through the end lines of said vein, lode, or ledge so existing and found within said Stone surface mining claim, and continued in their own direction, viz., in the direction of the dip of said vein, lode, or ledge as aforesaid, passes through, out of, and beyond the east vertical side line of said Stone surface claim and location into lands adjoining, to wit, into and under the said Gilt Edge surface claim.

Thirteenth. Said defendant admits that it has, underneath the surface of said Gilt Edge surface claim, followed and mined in and upon said Stone vein, lode, or ledge, and alleges that, by reason of the facts and premises above set forth, it had a right so to do, and denies that it has otherwise in any way interfered with said Gilt Edge claim, or any part thereof.

Wherefore defendant prays to be dismissed, with costs of suit, &c.

(Signed) JONAS SEELY,
Defendant's Attorney.

Endorsed: No. 963. In U. S. circuit court, district of Colorado. The Elgin Mining and Smelting Company, John W. Newton, Charles

Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens, plaintiffs, *vs.* The Iron Silver Mining Company, defendant. Answer to amended and supplemental complaint. Filed Oct. 30, 1882. (S'g'd) Edward F. Bishop, clerk. Jonas Seely, defendant's att'y.

And afterwards and on, to wit, the 31st day of October,
19 A. D. 1882, came again the said plaintiffs, by their attorneys aforesaid, and filed in said court and in said cause their replication to all of the answer theretofore filed herein, except paragraph XII thereof; and also filed as aforesaid their demurrer to paragraph XII of said answer; and the said replication is in words and figures as follows, to wit:

Replication to Part of Answer.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States within and for the District of Colorado.

THE ELGIN MINING AND SMELTING COMPANY *et als.*, Plaintiffs,
vs.
THE IRON SILVER MINING COMPANY, Defendant.

The plaintiffs, for replication to defendant's answer, excepting to paragraph twelve of said answer, deny that the defendant is the owner in fee or otherwise, or entitled to the possession under patent or otherwise, of that surface lode mining claim described in the said answer as the Stone claim.

Deny that defendant is owner in fee or otherwise or entitled to the possession of a certain vein or lode or ledge in said Stone claim.

Deny that there is any vein, lode, or ledge therein extending the entire length of said claim from north to south or otherwise.

Deny that there is any vein, lode, or ledge in said claim, or in any part thereof, or throughout its entire depth or to any depth; and deny that any vein, lode, or ledge, or deposit in said Stone claim enters any land adjoining.

Deny that said vein, lode, or ledge, or any vein, lode, or
20 ledge in said Stone claim is a vein or lode or ledge of rock in place in said claim.

Deny that there is any lode, vein, or ledge in rock in place in said claim bearing iron or lead or silver in large or any quantities, or of any value whatever.

Deny that there is any top or apex or outcrop of said vein, lode, or ledge, or of any vein, lode, or ledge, existing or found in said Stone surface claim throughout its entire extent, or throughout any extent or to any extent whatever, either from north to south or otherwise.

Deny that there is any vein, lode, or ledge in said Stone claim between any walls of rock in place.

Deny that there is any wall of rock in place in said claim.

Deny that there is a limestone foot or other wall, and deny that there is a porphyry or other hanging wall, and deny that there is any foot wall or hanging wall.

Deny that the true or other strike of said vein, lode, or ledge, or of any vein, lode, or ledge is north and south or in any other direction; and deny that it, or any vein, lode, or ledge in said claim, has any dip to the east or in any direction at an angle of 15°, or any angle below the plane of the horizon or below any plane.

Deny that defendant had or has any right whatever to enter underneath the surface of the Gilt Edge Lode claim or any part thereof, and allege that such entry was and is a trespass.

(Signed) MARKHAM, PATTERSON & THOMAS,
M. B. CARPENTER,
Att'ys for Pl'ff.

21 Endorsed: 963. Circuit court of U. S., district of Colorado. The Elgin Mining & Smelting Co. *et al. vs.* The Iron Silver Mining Co. Replication to all of ans. except par. XII. Filed Oct. 31, 1882. (S'g'd) Edward F. Bishop, clerk. V. D. Markham, M. B. Carpenter, for pl'ffs.

And the said demurrer is in words and figures as follows, to wit

Demurrer to Part of Answer.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court, &c.

THE ELGIN MINING AND SMELTING COMPANY *et als.*, Plaintiff,
vs.
THE IRON SILVER MINING COMPANY, Defendant.

The plaintiffs demur to the twelfth paragraph of defendant's answer, and for grounds of demurrer state—

I. That said paragraph does not state facts sufficient to constitute a defense to the action.

II. That said paragraph describes the property not by surface end lines but by end lines of the lode vein or ledge.

III. That the claim set up in said paragraph is repugnant to the law defining lode claims in this, that the law defines
22 such claim by end lines of the claim, while said paragraph attempts to justify the entry into plaintiffs' ground by reason of the dip of a vein, lode, or ledge between end lines of the vein instead of end lines of the claim, as required by law.

(Signed) M. B. CARPENTER.

MARKHAM, PATTERSON & THOMAS,
Attorneys for Plaintiffs.

Endorsed: 963. Circuit court of the U. S., district of Colorado. The Elgin M. & S'g Co. *et als. vs.* The Iron Silver M'g Co. Demurrer to par. XII of answer. Filed Oct. 31, 1882. (S'g'd) Edward F. Bishop, clerk. V. D. Markham, M. B. Carpenter, for plaintiff-.

And afterwards, and on, to wit, the 3d day of November, A. D. 1882, the same being one of the regular juridical days of the October term, A. D. 1882. of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Demurrer to Answer Overruled.

THE ELGIN MINING AND SMELTING COMPANY *et al.*

vs.

THE IRON SILVER MINING COMPANY.

For possession of specific real property and for damages.

23 At this day come the said plaintiffs, by M. B. Carpenter, Esq., their attorney, and the said defendant, by Jonas Seely, Esq., its attorney, also comes.

And the demurrer to paragraph XII of the answer to the amended and supplemental complaint herein having heretofore come on to be heard and having been submitted to the court, and the court being now sufficiently advised in the premises, it seemeth to the court here that the said answer is sufficient in law, and so the said demurrer is overruled.

And afterwards and on, to wit, the 4th day of November, A. D. 1882, came again the said plaintiffs by their attorneys aforesaid, and filed in said court and in said cause their replication to paragraph XII of the answer heretofore filed herein. And the said replication is in words and figures as follows, to wit:

Replication to Paragraph XII of Answer.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court, &c.

THE ELGIN MINING AND SMELTING COMPANY, *et al.*, Plaintiffs,

vs.

THE IRON SILVER MINING COMPANY, Def't.

The plaintiffs, for replication to the twelfth paragraph of defendant's answer, deny that said vein, lode, or ledge, or any vein,
24 lode, or ledge, on its dip, or otherwise, within vertical or other planes drawn downward or otherwise through the end lines of said vein, lode, or ledge, passes through, out of, or beyond the east or any vertical side line of said Stone claim or location, or into any lands adjoining or into or under the Gilt Edge claim.

Plaintiffs deny that there is any vein, lode, or ledge existing or found within said Stone surface claim.

Plaintiffs deny that there is any vien, lode, or ledge within vertical planes drawn downward through the end lines, either of any vein, lode, or ledge, or of any claim, or through any end lines con-

tinued in their own direction, or continued in the direction of the dip of any vein, lode, or ledge, passes through, out of, or beyond any side line of the Stone claim into or under said Gilt Edge claim.

Plaintiffs deny that said Stone claim has any end lines.

Plaintiffs deny that there is found in said Stone claim any vein, lode, or ledge having any dip whatever.

Plaintiffs aver that said Gilt Edge lode and claim is not upon the dip of any vein, lode, or ledge; neither is it within vertical planes drawn downward through the end lines of said Stone or any claim, or through end lines contained in their own direction.

(Signed) MARKHAM, PATTERSON & THOMAS,
AND M. B. CARPENTER,
Attorneys for Plaintiffs.

Endorsed: 963. Circuit court of the U. S., district of Colorado. The Elgin Mining and Smelting Company *et als. vs.* The Iron Silver Mining Company. Replication to par. XII of defendants answer. Filed Nov. 4, 1882. (S'g'd) Edward F. Bishop, clerk. Markham, Patterson & Thomas, and M. B. Carpenter, attorneys for plaintiffs.

25 And afterwards and on, to wit, the 2d day of December, A. D. 1882, came again the said plaintiffs, by their attorneys aforesaid, and filed in said court and in said cause a stipulation for trial by the court, and the said stipulation is in words and figures as follows, to wit:

Stipulation for Trial by Court.

In the United States Circuit Court, Eighth Circuit, District of Colorado.

THE ELGIN MINING AND SMELTING COMPANY, JOHN W. NEWTON, *et als.*
vs.
THE IRON SILVER MINING COMPANY.

It is hereby stipulated between the parties hereto that this action may be tried by the court without a jury, that being expressly waived. Dec. 2, 1882.

(S'g'd) MARKHAM, PATTERSON & THOMAS,
Attorneys for Plaintiffs.
(S'g'd) JONAS SEELY, *Attorney for Def'ts.*

Endorsed: No. 963. Circuit court U. S. Elgin Mining and Smelting Co. *vs.* Iron Silver Mining Co. Stipulation for trial by the court. Filed Dec. 2, 1882. (S'g'd) Edward F. Bishop, clerk. Jonas Seely, att'y for def't.

26 And afterwards and on the same day, to wit, the 2d day of December, A. D. 1882, the same being one of the regular juridical days of the October term, A. D. 1882, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial. Finding for Plaintiffs.

THE ELGIN MINING AND SMELTING COMPANY, JOHN W. NEWTON, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens

vs.

THE SILVER MINING COMPANY.

For possession of specific real property and for damages.

At this day come the said plaintiffs by T. M. Patterson, Esq., their attorney, and the said defendant, by Jonas Seely, Esq., its attorney, also comes.

And this cause now coming on to be tried by the court without a jury, in pursuance of a written stipulation thereto herein filed, and the court, having heard the evidence produced herein and the arguments of counsel, and being now sufficiently advised in the premises, doth find the issues herein joined for the said plaintiffs and against the said defendant, and that the plaintiffs are the owners in fee of the premises described in the complaint and entitled to the possession thereof.

Wherefore, on motion of the said plaintiffs, let judgment
27 be entered herein in favor of the said plaintiffs and against the said defendant for possession of the premises in the complaint herein described and the said plaintiffs' costs, to be taxed.

And thereupon, on the same day, to wit, the 2d day of December, A. D. 1882, judgment was duly entered against the said defendant in the judgment book of said court and in said cause in pursuance of the statute and rules of court; and the said judgment is in words and figures as follows, to wit:

Judgment.

THE ELGIN MINING AND SMELTING COMPANY, JOHN W. NEWTON, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens,

vs.

THE IRON SILVER MINING COMPANY.

For possession of specific real property and for damages.

On this 2d day of December, A. D. 1882, the same being one of the regular judicial days of the October term, A. D. 1882, of said court, there being present the Honorable Moses Hallett, district judge, it is considered by the court that the said plaintiffs do have and recover of and from the said defendant the possession of the premises, lands, and tenements in said complaint mentioned, to wit:

All that certain lode mining claim situate in California Gulch, in California mining district, county of Lake and State of Colorado, and called the Gilt Edge Lode, and more fully described by metes and bounds, as follows, to wit: Beginning at corner No. (1) one (same as corner No. (2) two of Wm. Reddick); thence
28 south (72°) seventy-two degree west two hundred feet to corner No. (2) two; thence north (18°) eighteen degrees west one

hundred feet to corner No. (3) three (same as corner No. (13) of Stone Lode); thence north (89°) eighty-nine degrees (40′) forty minutes east one hundred ninety-seven feet to corner No. (4) four (same as corner No. (1) one of A. Y.); thence north (45) forty-five degrees east three hundred fifty-seven and $\frac{7}{10}$ feet to corner No. (5) five (same as northeast corner of Minie); thence north (12°) twelve degrees west one hundred twelve feet to corner No. (6); thence north (45°) forty-five degrees east seven hundred twenty feet to corner No. (7) seven; thence south (18°) eighteen degrees east three hundred feet to corner No. (8) eight; thence south (46°) forty-six degrees west ten hundred sixty-four feet to corner No. (9) nine (same as corner No. (32) thirty-two, survey No. (281); thence north (18°) eighteen degrees west one hundred twenty-five feet to corner No. (1) one, the place of beginning, and that they have a writ of possession therefor.

It is further considered by the court that the said plaintiffs do have and recover of and from the said defendant their costs by them in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the 9th day of December, A. D. 1882, the same being one of the regular judicial days of the October term, A. D. 1882, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

29 *Order Fixing Amount of Bond on Writ of Error.*

THE ELGIN MINING AND SMELTING COMPANY *et al.*
vs.
THE IRON SILVER MINING COMPANY.

For possession of specific real property and for damages.

At this day comes the said defendant, by Jonas Seely, Esq., its attorney, and on its motion it is ordered that bond upon writ of error herein shall be in the sum of two thousand dollars ($2,000.00).

And afterwards and on, to wit, the 9th day of December, A. D. 1882, came again the said defendant, by its attorney aforesaid, and filed in said court its bond, and sued out of said court a writ of error and citation to the Supreme Court of the United States; and is in words and figures as follows, to wit:

Bond on Writ of Error.

30 THE UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents that John R. Hanna and William Barth, as sureties, are held and firmly bound unto The Elgin Mining and Smelting Company, John W. Newton, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, & William Havens in the full and just sum of two thousand dollars, to be paid to the said The Elgin Mining and Smelting Company, John W. Newton, Charles

W. Beeman, and William Havens; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 9th day of December, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately, at the October term, A. D. 1882, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between The Elgin Mining and Smelting Company, John W. Newton, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens, plaintiffs, and The Iron Silver Mining Company, defendant, judgment was rendered against the said The Iron Silver Mining Company, and the said The Iron Silver Mining Company having obtained a writ of error to reverse the judgment of said court, and a citation, directed to the said The Elgin Mining and Smelting Company, John W. Newton, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens, citing and admonishing them to be and appear at a Supreme Court of the United States to be held at Washington on the 2d Monday of October next:

Now the condition of the above obligation is such that if the said The Iron Silver Mining Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JOHN R. HANNA. [SEAL.]
" WILLIAM BARTH. [SEAL.]

Approved Dec. 9th, 1882.
(S'g'd) MOSES HALLETT, *Judge.*

31 [Endorsed:] Gen. No. 963. Circuit court of the United States, district of Colorado. Iron Silver Mining Company, plaintiff in error, *vs.* Elgin Mining & Smelting Co. *et al.*, def'ts in error. Bond on writ of error. $2,000.00. Filed this 9 day of Dec'r, A. D. 1882. (S'g'd) Edward F. Bishop, clerk.

And the said writ of error is hereto attached to wit:

32 *Writ of Error to Circuit Court U. S., District of Colorado.*

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court between The Elgin Mining and Smelting Company, John W. Newton, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens, and The Iron Silver Mining Company, a manifest error hath happened, to the great damage of the said The

Iron Silver Mining Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness The Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9th day of Dec'r, in the year of our Lord, one thousand eight hundred and eighty-two, and of the Independence of the United States the 107th year.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk.*

Allowed by—

MOSES HALLETT, *District Judge.*

33 The plaintiff in error having given the security required by law on the issuing of the citation, and having served the within writ of error, by lodging a copy thereof for the adverse party in the clerk's office in apt time, this writ is therefore made a supersedeas.

EDWARD F. BISHOP, *Clerk.*

[Endorsed:] Gen. No. 963. Circuit court of the United States, district of Colorado. Iron Silver Mining Company, plaintiff in error, *vs.* Elgin Mining and Smelting Co. *et al.* Writ of error to circuit court, U. S. district of Colorado. Filed in circuit court of the U. S. this 9th day of Dec'r, A. D. 1882. Edward F. Bishop, clerk. Jonas Seely, attorney for plaintiff in error.

Return.

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 23d day of December, A. D. 1882.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk.*

And the said citation is hereto attached, to wit:

34 *Citation.*

U. S. Circuit Court.

UNITED STATES OF AMERICA, *District of Colorado:*

The United States of America to the Elgin Mining and Smelting Company, John W. Newton, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein The Iron Silver Mining Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, a judge of the circuit court of the United States for the district of Colorado, this 9th day of December, in the year of our Lord one thousand eight hundred and eighty-two.

MOSES HALLETT, *Judge.*

35 *Proof of Service.*

THE UNITED STATES OF AMERICA, } ss:
District of Colorado. }

On this 9th day of December, A. D. 1882, personally appeared Samuel Milton before me, the subscriber, a clerk of the circuit court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to Thomas M. Patterson, Esq., attorney of record for the said defendants in error.

SAM'L MILTON.

Sworn to and subscribed before me this 9th day of Dec'r, A. D 1882.

EDWARD F. BISHOP,
Clerk District Court U. S.

[Endorsed:] Gen. No. —. Supreme Court of the United States. Iron Silver Mining Company, plaintiff in error, *vs.* Elgin Mining and Smelting Co. *et al.*, defendants in error. Citation. Filed in Supreme Court of the U. S. this — day of ——, A. D. 18—. ——, clerk. Jonas Seely, attorney for plaintiff in error.

36 And afterwards and on, to wit, the 14th day of December, A. D. 1882, came again the said defendant, by its attorney aforesaid, and filed in said court and in said cause its bill of the exceptions reserved by it upon the trial of the issues herein, and the said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

In the Circuit Court of the United States, Eighth Circuit, District of Colorado.

THE ELGIN MINING AND SMELTING COMPANY, JOHN W. Newton, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens, Plaintiffs, *vs.* THE IRON SILVER MINING COMPANY, Defendant. } At Law.

Be it remembered that this action came on for trial in the above-named court on the second day of December, A. D. 1882, and was tried by the court without a jury, a jury trial being expressly waived by the parties in waiting.

The plaintiffs, to prove the issues on their part, produced in evidence a patent from the Government of the United States, in usual form of patents, for lode mining claims for the premises sued for, called the Gilt Edge claim, and then defendant admitted that plaintiffs have succeeded to and are invested with the title to the property conveyed by said patent, and that before the commencement of this action defendant had entered underneath the surface of said Gilt Edge claim at a point east of the stone surface claim, and
37 when said action was commenced defendant was engaged in mining and carrying away iron, lead, and silver ores from underneath the surface of said Gilt Edge claim.

And thereupon it was agreed that plat "A," hereto attached, correctly represents and shows the shapes and relative positions of the said Gilt Edge mining claim and the Stone mining claim, the property of defendant, and that the lines from No. 5 to 6 and from 1 to 14 on said plat are the two end lines of the said Stone surface claim, so called by the locator thereof and in the plat accompanying the application for patent.

It was further agreed that the plat "B," hereto attached, is a correct copy of the "plat" of the Gilt Edge claim contained in the patent of said claim, which also shows its relative position to the said Stone claim partially on said plat, the Stone claim being marked "Sur. No. 217."

And thereupon plaintiffs rested.

Whereupon defendant, to prove the issues on its part, introduced in evidence a patent for the Stone claim under which and divers conveyances it was admitted by plaintiffs that defendant holds title in fee to the premises in said patent granted, which patent reads as follows:

General Land Office, No. 2289.

Mineral Certificate No. 120.

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there have been

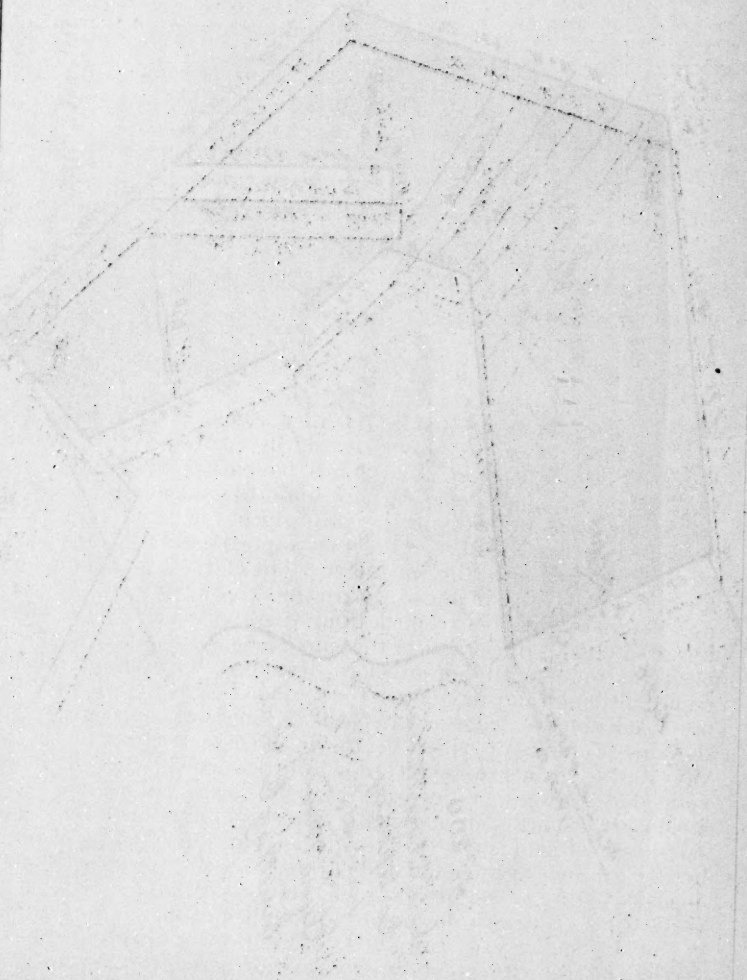
deposited in the General Land Office of the United States the
38 plat and field-notes of survey of the claim of Alvinus B. Wood, upon the stone lode, accompaned by the certificate of the register of the land office at Fair Play, in the State of Colorado, whereby it appears that in pursuance of the said Revised Statutes of the United States Alvinus B. Wood did, on the sixteenth day of April, A. D. 1877, enter and pay for said mining claim or premises, being mineral claim No. 120 in the series of said office, designated by the surveyor general as lot No. 217, embracing a portion of the unsurve-d public domain in California mining district, in the county of Lake and State of Colorado, in the district of lands subject to sale at Fair Play, containing nine (9) acres and eighteen hundredths ($\frac{18}{100}$) of an acre of land, more or less, and, according to the returns on file in the General Land Office, bounded and described and platted as follows, with magnetic variation at fifteen (15) degrees east, to-wit:

Beginning at corner No. 1, a limestone 6 x 8 x 9 inches in size, in mound of stones, chiseled "1-217," from which a bald mountain near the head of Sacramento creek bears north eighty-two (82) degrees thirty (30) minutes east, a blazed pine tree fourteen (14) inches in diameter bears south eighteen (18) degrees ten (10) minutes east at the distance of sixteen (16) feet, and a blazed pine tree twelve (12) inches in diameter bears south thirty-five (35) degrees west at the distance of twenty-four (24) feet; thence from said corner No. 1 south eighty-three (83) degrees east four hundred (400) feet to road, five hundred (500) feet to bank of placer, five hundred and thirty (530) feet to corner No. 2, a pine post four (4) inches square, in
39 mound of stones marked "2-217;" thence south eighteen (18) degrees east one hundred and twenty-one and two-tenths ($121\frac{2}{10}$) feet to corner No. 3, a pine post four (4) inches square, in mound of stones, marked "3-217;" thence south forty-five (45) degrees six (6) minutes west one hundred and ninety-four and forty-seven hundredths ($194\frac{47}{100}$) feet to corner No. 4, a pine post four (4) inches square, marked "4-217;" thence north forty-eight (48) degrees forty-five (45) minutes west ten and two hundredths ($10\frac{2}{100}$) feet to corner No. 5, a pine post four (4) inches square, marked "5-217;" thence south twenty-six (26) degrees forty (40) minutes west three hundred (300) feet to corner No. 6, a pine post four (4) inches square, marked "6-217," from which corner No. 2 of survey No. 218, made for the claim of Alvinus B. Wood upon the rock lode, bears north forty-eight (48) degrees forty-five (45) minutes west at the distance of one hundred and five and seven-tenths ($105\frac{7}{10}$) feet; thence from said corner No. 6 south forty-eight (48) degrees forty-five minutes east two hundred and five and fifty-five hundredths ($205\frac{55}{100}$) feet to corner No. 7, a pine post four (4) inches square, marked "7-217;" thence north forty-five (45) degrees six (6) minutes east two hundred and sixty (260) feet to corner No. 8, a pine post four (4) inches square, marked "8-217;" thence north along west boundary of survey, made for the Oro Platta Lode, three hundred and sixty (360) feet to corner No. 9, a pine post four (4) inches square, marked "9-217;" thence east along north boundary of said survey, made for the Ora Plata Lode, fifty (50) feet to corner No. 10, a pine post

four (4) inches square, in mound of stone marked "10-217;" thence south along east boundary of said survey, made for the Ora Plata
40 Lode, three hundred and ten and eighteen hundredths ($310\frac{18}{100}$) feet to corner No. 11, a pine post four (4) inches square, marked "11-217;" thence north forty-five (45) degrees six (6) minutes east three hundred and twenty-three and forty-five hundredths ($323\frac{45}{100}$) feet to corner No. 12, a pine post four (4) inches square, marked "12-217;" thence north eighteen (18) degrees west four hundred and eighty-five and thirty-two hundreths ($485\frac{32}{100}$) feet to corner No. 13, a pine post four (4) inches square, in mounds of stones marked "13-217;" thence north eighty-three (83) degrees west six hundred and thirteen and ninety-nine hundredths ($613\frac{99}{100}$) feet to corner No. 14, a pine post four (4) inches square, marked "14-217;" thence south twenty-six (26) degrees forty (40) minutes west along easterly boundary of survey No. 216, made for the claim of Alvinus B. Wood upon the Wood lode, three hundred and eight and fifty-eight hundredths ($308\frac{58}{100}$) feet to corner No. 5 of said survey No. 216, from which U. S. Locating monument bears north sixty-three (63) degrees thirty (30) minutes west at the distance of ninety-six hundred and thirty-three (9,633) feet three hundred and eighteen and fifty-eight hundredths ($318\frac{58}{100}$) feet to the place of beginning, containing nine (9) acres and eighteen hundredths ($\frac{18}{100}$) of an acre of land, more or less, and embracing fifteen hundred (1,500) linear feet of said Stone lode along the course thereof, as represented by red shading in the following plat:

(Here follows diagram marked p. 41.)

42 Now, know ye that the United States of America, in consideration of the premises and in conformity with the said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Alvinus B. Wood, and to his heirs and assigns, the said mining premises hereinbefore described as lot No. 217, embracing a portion of the unsurveyed public domain, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of fifteen hundred (1,500) linear feet of the said Stone vein, lode, ledge, or deposit, for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges, or deposits, throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, alt-ough such veins, lodes, ledges, or deposits, in their downward course, may so far depart from a perpendicular as to extend outside the vertical side lines of said survey: Provided, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes,



ledges, or deposits: And provided further, That nothing in this conveyance shall authorize the grantee herein, his heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another—

43 To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said Alvinus B. Wood, and to his heirs and assigns, forever, subject, nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 217, with fifteen hundred (1,500) linear feet of the Stone vein, lode, ledge, or deposit for the length aforesaid, throughout its entire depth as aforesaid, together with all other veins, lodes, ledges, or deposits, throughout their entire depths as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge, or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and accrued water-rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water-rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress the Legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

44 In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and first.

[Seal Gen'l Land Office United States.]

By the President:

R. B. HAYES,
By D. D. CONE, *Secretary.*
S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 27, pages 298 to 304, inclusive.

And the defendant, to further prove the issues on its part, offered to prove—

(1) That said Stone vein, lode, or ledge mentioned in said patent is a vein, lode, or ledge of rock in place bearing iron, lead, and silver in large quantities, and is valuable on account thereof.

(2) That the top, apex, and outcrop of said vein, lode, or ledge exists and is found in said Stone surface claim through its entire extent from north to south between walls of rock in place, a limestone foot wall, and a porphyry handing wall.

(3) That the true strike of said vein, lode, or ledge is north and south, and it has a dip to the east at an angle of 15° below the plane of the horizon.

(4) That said vein, lode, or ledge, on its dip aforesaid within vertical planes drawn downward through the end lines of said vein, lode, or ledge, so existing and found within said Stone surface mining claim and continued in their own direction, viz., in the direction of the dip of said vein, lode, or ledge as aforesaid, passes through, out of, and beyond the east vertical side line of said Stone surface claim and location into lands adjoining, to wit, into and under the said Gilt Edge surface claim.

(5) That while said defendant admits that it has underneath the surface of said Gilt Edge surface claim followed and mined in and upon said Stone vein, lode, or ledge by reason of the facts and premises above set forth it had a right so to do, and that it his not otherwise in any way interfered with said Gilt Edge claim, or any part thereof.

To which plaintiffs objected, on the ground that if proven the same would not be a defense to said action nor tend to establish a defense thereto, and that by reason of the surface form or shape of said Stone claim its owners had no right under the laws of the United States or otherwise to follow the lode alleged to exist therein in its downward course beyond the lines of said claim and into plaintiffs' claim; and that no part of the Gilt Edge claim on the mineral or lode within it was within vertical planes drawn downward through the end lines of said Stone claim and continued indefinitely in their own direction.

The court sustained the objection and excluded the evidence so offered, to which ruling and action of the court the defendant then and there duly excepted.

The following diagrams are plats A and B theretofore referred and offered in evidence by the parties and required by the court.

(Here follow diagrams marked pp. 46, 47, 48, 49.)

No other evidence was given at the trial of said action.

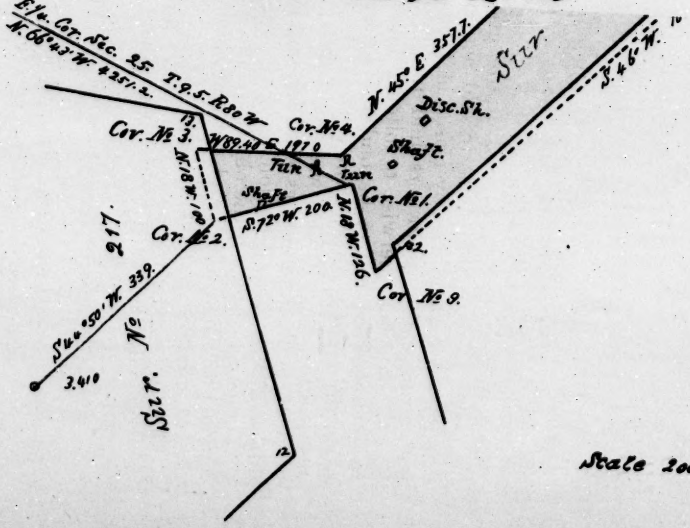
Judgment by the court was thereupon entered for the plaintiffs and against the defendant.

And said defendant tenders the foregoing as its bill of exceptions, and prays that the same may be signed and sealed as such by the judge of said court presiding at the trial of said action, which is done accordingly on this 14th day of December, A. D. 1882.

(Signed) MOSES HALLETT, [SEAL.]
Dist. Judge.

Plat.
of the claim of
Albert Sherwin, Trustee et al
upon the
Gilt Edge Lode

46



Scale 200 Feet = 1 Inch.

Received by clerk Dec'r 9, 1882.
(Signed) EDWARD F. BISHOP, *Clerk.*

Endorsed: No. 963. In U. S. circuit court, district of Colorado. The Elgin Mining and Smelting Company, John W. Newton, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, and William Havens, plaintiffs, *vs.* The Iron Silver Mining Co., defendant. Bill of exceptions. Filed Dec. 14, 1882. (S'g'd) Edward F. Bishop, clerk. Jonas Seely, defendant's att'y.

51 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore filed or had and entered of record in said court, and in a certain cause lately in said court pending, wherein The Elgin Mining and Smelting Company *et al.* were plaintiffs and The Iron Silver Mining Company was defendant, as fully and completely as the same still remain of record or on file in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 23d day of December, A. D. 1882.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk.*

Cost of transcript:

85 folios, @ 10 c.	8 50
4 maps, @ $2.50	10 00
1 map	1 00
Certificate of clerk	35
	$19 85

Endorsed on cover: Colorado C. C. U. S. No. 200. The Iron Siver Mining Company, plaintiff in error, *vs.* The Elgin Mining & Smelting Company, John W. Newton, Charles Dennison, M. B. Carpenter, G. L. Havens, J. W. Beeman, & William Havens. Filed 6th March, 1883.